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Filed

Nov. 13 1876

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~288~~ 67

PHILADELPHIA BAR ASSOCIATION

THE CHESAPEAKE AND OHIO CANAL COMPANY, APPELLANT,

vs.

A. ROSS RAY AND ALBERT RAY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 23, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 288.

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1 *Bill of complaint.—Filed February* 26, 1873.

In the supreme court of the District of Columbia.

A. ROSS RAY AND ALBERT RAY, complainants, *vs.* THE CHESAPEAKE AND OHIO CANAL COMPANY, defendant.	No. 3090. Equity docket 12.

To the supreme court, Dist. of Columbia, in equity:

A. Ross Ray and Albert Ray, of the District of Columbia, bring this their bill of complaint against the Chesapeake and Ohio Canal Company of the same place.

And thereupon your orators shew:

1. That they are, and have been since the year 1848, tenants of a flouring and grist mill in Georgetown, in said District, the property of Alexander Ray, their father, and engaged in the business of carrying on the same; that said mill is situate on Water street, fronting thereon about forty feet and running back with Potomac street about sixty feet, and was built in or about said year with exclusive reference to the use, as a motive power, of water to be supplied from the canal owned by the defendant, and distant about two hundred and fifty feet from said mill.

2. That the site of said mill was purchased by said Alexander Ray from George Bomford, who owned through from said Water street to within a few feet of the canal of the defendant, and on the upper or canal end of said property had erected and operating a cotton-mill,
2 and who had leased from the defendant for twenty years, renewable forever, four hundred and seventy-six square inches of water to be drawn from said canal through two circular outlets constructed at or near the bottom of the canal as a waste-weir, and to be used by him and his assigns for any manufacturing purposes whatever, excepting only the making of gunpowder.

3. That as part of said purchase and for the same consideration the said George Bomford assigned to said Alexander Ray, before the erection of the mill of the latter, one hundred square inches of said water absolutely, and fifty inches contingently, the latter to continue only until said assignee could obtain a lease of like quantity from the defendant. The defendant to said George Bomford's assignment marked R. & Bro., Exhibit No. 1, and of the said assignment from said Bomford to said Alexander Ray, marked R. & Bro., Exhibit No. 2, and pray the same may be taken as part thereof.

4. That subsequently a grant of one hundred and fifty square inches was obtained from the defendant by said Alexander Ray, who thereupon relinquished the fifty square inches, contingently assigned as aforesaid, but that said grant was provisional only and liable to be revoked.

In the year 1859 or 1860, the defendant having water to lease, your orators determined to make said provisional supply absolute, and also, if a sufficiency of water could be obtained, to greatly enlarge the machinery and capacity of said mill; that the said purpose was duly communicated to the defendant who agreed to supply the water necessary to drive said mill with its increased machinery and capacity; and that on the 1st of May, 1860, a lease was executed by the defendant to your orators for four hundred square inches of water, a copy of which
3 lease is filed herewith, marked R. & Bro., Exhibit No. 3, and prayed

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2. That the site of said mill was purchased by said Alexander Ray from George Bomford, who owned through from said Water street to within a few feet of the canal of the defendant, and on the upper or canal end of said property had erected and operating a cotton-mill,
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In the year 1859 or 1860, the defendant having water to lease, your orators determined to make said provisional supply absolute, and also, if a sufficiency of water could be obtained, to greatly enlarge the machinery and capacity of said mill; that the said purpose was duly communicated to the defendant who agreed to supply the water necessary to drive said mill with its increased machinery and capacity; and that on the 1st of May, 1860, a lease was executed by the defendant to your orators for four hundred square inches of water, a copy of which
3 lease is filed herewith, marked R. & Bro., Exhibit No. 3, and prayed

to be taken as part hereof. That upon said lease, or agreement therefor, your orators ceased to hold the one hundred and fifty square inches provisionally granted as aforesaid, and were entitled only to the one hundred square inches assigned by said George Bomford, and the said four hundred square inches leased to them by the defendant. That the privilege of renewal in the said lease to George Bomford having been availed of by the said Alexander Ray, the defendant undertook to renew the same, but instead of executing a deed of renewal for the quantity of water to which said Ray was entitled, filled up a blank form for the like number of square inches, but to be drawn under a different head or pressure, whereby the said Ray, and through him your orators, tenants as well of the motive power as of the mill itself, were deprived of at least twenty square inches of water; and your orators file herewith a copy of said intended deed of renewal, marked R. & Bro., Exhibit No. 4, and pray the same may be taken as part hereof.

5. That your orators, confiding in the necessary motive power, carried into execution the proposed enlargement of the machinery and capacity of said mill, expending therein upwards of twelve thousand dollars, with the knowledge and approval of the defendant.

6. That said enlargement being completed or about to be completed in said year 1860, the works for conducting the water from the canal to said mill and for remeasuring the quantity of water to which your orators were entitled, were constructed and located that the forebay or trunk, mentioned in said leases, was constructed and located and covered or bridged at the canal bank under the special direction of the engineer and superintendent of the defendant, the officers charged with the duty, and with their approval, and under like direction and
4 superintendence, and with like approval, aperture or gauge and sliding gate thereat were constructed and located at the wheel of said mill, and so located with the knowledge and approval of the defendant. And your orators show that the location of said gauge and sliding-gate has since remained as originally fixed in 1860, and that all said works have been since repeatedly inspected and approved by the defendant through its proper officers, and that all said works have been since kept in repair, as originally located, at the cost of your orators, and under the direction and superintendence of the officers of the defendant charged with that duty and with their approval, and that the rent under said leases, as carried into execution by mutual consent as aforesaid, has since said year been paid and received by your orators and defendant; and that your orators have in all respects well and faithfully kept and performed the covenants and stipulations in said lease by them, or said Alexander Ray, to be kept and performed. That when said works were constructed and located as aforesaid, there was also as part and in consideration thereof placed at the opening of the forebay into the canal a gate at the cost of your orators, so as to enable the defendant to control the water power granted by said leases, in accordance with the provisions thereof.

7. And your orators show that said gauge and gate were placed at the wheel in execution of the primary intent and meaning of said leases, and to accomplish the object contemplated as well by your orators as the defendant, which object was to drive the mill with its enlarged machinery and capacity by allowing your orators to receive the full quantity of water which they had leased, and for which they were to pay, and that had said gauge and gate been placed at the canal bank
5 said object could not have been accomplished, and, besides, your orators, notwithstanding they were paying the usual rate for

which water was leased to tenants whose mills were located at the canal, would have been obliged to pay for water which, owing to the distance from the mill from the canal, they did not and could not receive. That said gauge, though located at the wheel, was there located in exact conformity, as was at the time supposed, with the conditions prescribed by said leases, and in respect to the aperture or gauge, but that your orators subsequently discovered that, through mistake, no allowance had been made for the diminution of head under which the said hundred inches of water were drawn under the intended renewal of the lease thereof, and, further, that the engineer of the defendant in ascertaining the bottom of the canal proper had, through mistake, adopted the mitre-sill of the aqueduct across the Potomac River as fixing said bottom, whereas said mitre-sill or the bottom of said aqueduct was and is one foot, or nearly so, higher than the mitre-sill or bottom of the canal, owing to a mistake in the construction of the aqueduct, in consequence of which mistake, the banks of the canal were after such construction raised an additional foot, thereby giving an additional foot of head or pressure to the holders of water leases. Your orators show that said error, in ascertaining the bottom of the canal, alone deprived them of seventy square inches of water, or that the gauge as constructed and fixed was less by the quantity than it should have been.

8. That each of said leases, after providing for the construction, location, and repair of the works necessary to conduct and measure the water leased, reserves to the defendant the right or privilege of making such alterations from time to time in any of the said works as might be considered necessary by the defendant, for the following purposes:

6 "to prevent or lessen the inconvenience to the navigation of said canal and the use of its towing path, which may be found to arise from the use of said water, or that may be thought necessary by the said party of the first part, for the greater security of the said canal or its works.

That early in 1865, other millers who held water leases from the defendant made application to be allowed to draw at their wheels, thereby to secure the full quantity of water leased and paid for by them, which application led to the passage, on the 23d of February, 1865, by the then board of directors of the defendant, of a resolution requiring that the superintendent at Georgetown of the canal should, under the direction of the chief engineer, place the water gauges of the mills at Georgetown at such points as should be deemed most advisable to effect the object of the respective water grants, and to limit the flow of water to the quantity to which the lessees were severally entitled: Provided, That the lessees should severally assent in writing that the officers of the company should have free access to the premises of said lessees for the examination and regulation of said gauges: And provided further, That the board might at any time during their pleasure, if they should deem it necessary to alter or change the position of any gauge or gauges as contemplated by the lessees.

And your [orators] show that the provisions of said resolutions were assented to in writing by said millers, and among them by your orators; and they file herewith a copy of said resolution and acceptance, marked R. & Bro., Exhibit No. 5, and pray the same may be taken as part thereof; and your orators are advised that the true intent and meaning of said resolution is, that the power of making alterations in the works provided for by said leases (which are substantially similar to

7 those of the other millers who accepted said resolution) should extend as well to the new gauges, substituted under said resolu-

to be taken as part hereof. That upon said lease, or agreement therefor, your orators ceased to hold the one hundred and fifty square inches provisionally granted as aforesaid, and were entitled only to the one hundred square inches assigned by said George Bomford, and the said four hundred square inches leased to them by the defendant. That the privilege of renewal in the said lease to George Bomford having been availed of by the said Alexander Ray, the defendant undertook to renew the same, but instead of executing a deed of renewal for the quantity of water to which said Ray was entitled, filled up a blank form for the like number of square inches, but to be drawn under a different head or pressure, whereby the said Ray, and through him your orators, tenants as well of the motive power as of the mill itself, were deprived of at least twenty square inches of water; and your orators file herewith a copy of said intended deed of renewal, marked R. & Bro., Exhibit No. 4, and pray the same may be taken as part hereof.

5. That your orators, confiding in the necessary motive power, carried into execution the proposed enlargement of the machinery and capacity of said mill, expending therein upwards of twelve thousand dollars, with the knowledge and approval of the defendant.

6. That said enlargement being completed or about to be completed in said year 1860, the works for conducting the water from the canal to said mill and for remeasuring the quantity of water to which your orators were entitled, were constructed and located that the forebay or trunk, mentioned in said leases, was constructed and located and covered or bridged at the canal bank under the special direction of the engineer and superintendent of the defendant, the officers charged with the duty, and with their approval, and under like direction and
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7. And your orators show that said gauge and gate were placed at the wheel in execution of the primary intent and meaning of said leases, and to accomplish the object contemplated as well by your orators as the defendant, which object was to drive the mill with its enlarged machinery and capacity by allowing your orators to receive the full quantity of water which they had leased, and for which they were to pay, and that had said gauge and gate been placed at the canal bank
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which water was leased to tenants whose mills were located at the canal, would have been obliged to pay for water which, owing to the distance from the mill from the canal, they did not and could not receive. That said gauge, though located at the wheel, was there located in exact conformity, as was at the time supposed, with the conditions prescribed by said leases, and in respect to the aperture or gauge, but that your orators subsequently discovered that, through mistake, no allowance had been made for the diminution of head under which the said hundred inches of water were drawn under the intended renewal of the lease thereof, and, further, that the engineer of the defendant in ascertaining the bottom of the canal proper had, through mistake, adopted the mitre-sill of the aqueduct across the Potomac River as fixing said bottom, whereas said mitre-sill or the bottom of said aqueduct was and is one foot, or nearly so, higher than the mitre-sill or bottom of the canal, owing to a mistake in the construction of the aqueduct, in consequence of which mistake, the banks of the canal were after such construction raised an additional foot, thereby giving an additional foot of head or pressure to the holders of water leases. Your orators show that said error, in ascertaining the bottom of the canal, alone deprived them of seventy square inches of water, or that the gauge as constructed and fixed was less by the quantity than it should have been.

8. That each of said leases, after providing for the construction, location, and repair of the works necessary to conduct and measure the water leased, reserves to the defendant the right or privilege of making such alterations from time to time in any of the said works as might be considered necessary by the defendant, for the following purposes:

6 "to prevent or lessen the inconvenience to the navigation of said canal and the use of its towing path, which may be found to arise from the use of said water, or that may be thought necessary by the said party of the first part, for the greater security of the said canal or its works.

That early in 1865, other millers who held water leases from the defendant made application to be allowed to draw at their wheels, thereby to secure the full quantity of water leased and paid for by them, which application led to the passage, on the 23d of February, 1865, by the then board of directors of the defendant, of a resolution requiring that the superintendent at Georgetown of the canal should, under the direction of the chief engineer, place the water gauges of the mills at Georgetown at such points as should be deemed most advisable to effect the object of the respective water grants, and to limit the flow of water to the quantity to which the lessees were severally entitled: Provided, That the lessees should severally assent in writing that the officers of the company should have free access to the premises of said lessees for the examination and regulation of said gauges: And provided further, That the board might at any time during their pleasure, if they should deem it necessary to alter or change the position of any gauge or gauges as contemplated by the lessees.

And your [orators] show that the provisions of said resolutions were assented to in writing by said millers, and among them by your orators; and they file herewith a copy of said resolution and acceptance, marked R. & Bro., Exhibit No. 5, and pray the same may be taken as part thereof; and your orators are advised that the true intent and meaning of said resolution is, that the power of making alterations in the works provided for by said leases (which are substantially similar to

7 those of the other millers who accepted said resolution) should extend as well to the new gauges, substituted under said resolu-

tion, as to those mentioned in the said leases, the said power being, however, expressly confined to such alterations as might be necessary to prevent or lessen the inconvenience to the navigation of the said canal and the use of its towing path, which might be found to arise from the use of said water, or that might be thought necessary by the said party of the first part, for the greater security of the said canal or its works, and that the defendant has no right to change or alter said gauges arbitrarily, nor except in accordance with said resolution and leases, and for the specific purposes therein referred to and expressed. And your orators aver that their gauge had been, by mutual consent, in 1860, constructed and located at the wheel as above mentioned, and they never intended to clothe the defendant with the arbitrary power which, as will hereafter appear, it pretends to possess, but that it was just and proper that the power of alteration, reserves in said leases for the aforesaid purposes, should extend to said gauge so located at the wheel, and also that the officers of the defendant should have free access to their premises to examine said gauge and keep the quantity of water within the limit of said leases.

9. That early in 1870 the defendant complained that the millers, and among them your orators, were using more water than they were entled to receive under their respective leases, and new gauges were ordered to be constructed by the millers, at their costs, but under the direction of the chief engineer and superintendent of the defendant. To this demand the millers, including your orators, yielded, and the gauges were in every instance contracted in their apertures, though the
8 apertures of the gauges in use had been fixed by the officers of the defendant charged with said duty; but said contraction was not claimed in any instance as due in consequence of the location of the gauges at the wheels, but because of the alleged claim that the gauges were located at too low a point whereby the head was slightly increased, and to the further claim that an advantage accrued to the millers from having the bottom of the trunk or forebay constitute the bottom of the gauge; both said claims assuming that the millers were entitled to draw as much as would flow into open space through their gauges placed at canal bank, under the conditions of their leases, but alleging that they were in fact drawing more.

That said contraction in the case of your orators amounted to twenty-seven square inches—the new gauge being less than the one removed by that quantity of aperture—and that in readjusting the aperture the defendant wholly failed to make allowance for the aforesaid errors against your orators, and for the diminution of head, from its own misconduct and neglect as hereinafter mentioned.

10. And your orators are advised and charge that, under the true construction of the said leases, the thing granted and to be paid was for a certain quantity of water, whereby the water-power requisite to turn the mill was to be created, which quantity was so much as would pass into open space through an aperture, the shape whereof was left to the option of the lessees, located two feet from the bottom of the canal and under the head usual in the canal, and that the location and size of the gauge in said leases are merely the means of measurement of the quantity of water to which your orators would be entitled if the water was allowed to flow through said gauge into open space; that your orators are thus entitled as of the time when said leases were made, and that it is
9 not competent for the defendant to deprive your orators of said quantity of water by subsequent leases or contracts, working a diminution of head or pressure, or when such diminution results from

misconduct or neglect of the defendant; and your orators, on information and belief, aver and charge that the practice of the defendant, under leases similar to your orators, has always been to vary the location and size of the gauge according to the elevation of the mill to be supplied, and other conditions, so as to give the lessee, so far as could be done, the quantity of water to which he was theoretically entitled under the conditions of the lease.

11. Your orators, on information and belief, further show that for some time prior to 1870, a certain Henry H. Dodge held a disputed claim for unliquidated damages against the defendant, and that on the 17th of February, in said year, the latter, in pretended compromise of said claim, executed a lease to said Dodge for fifteen hundred inches of water at a nominal rent of twenty-five cents per inch per annum, for the term of fifty years, and with the right of renewal forever, at the rent of fifty cents per inch per annum, on a payment of a bonus for renewal of ten dollars, which lease, after declaring that the existing grants of surplus water shall be assumed as the maximum of surplus water or water power subject to lease, proceeds to grant surplus water then existing, or thereafter to exist, over and above said maximum, and leaves said Dodge and his assignees wholly without control or regulation in respect of the manner of drawing or using the water, and without any provision whatever for the protection of interests under the then existing leases or grants; and your orators file herewith a copy of said lease, marked R. & Bro., Exhibit No. 6, and pray the same may be taken as part hereof.

10 And your orators further show that on said 17th of March, 1870, the defendant also, in pretended compromise of said claim, executed a further lease of valuable land belonging, or claimed to belong, to it, lying between the canal and the Potomac River, and extending for about twenty-seven hundred feet, which lease was at the nominal rent of one hundred dollars per annum, and for fifty years, renewable forever at the rent of two hundred dollars per annum, on payment of a bonus of ten dollars, and they file herewith a copy of said lease, marked R. & Bro., No. 7, and pray the same may be taken as part hereof.

And your orators are advised and charged that it was not competent for the defendant, under its charter, to execute said leases or either of them, and that even if the power existed, the execution of said leases was a gross abuse thereof; that the water leased did not in fact exist, as the defendant well knew, and it was not competent for its covenant to lease waste water, which, in the future, might be created; that said water was not leased for the purpose of supplying works or machinery requiring a water power—the only purpose for which it could be leased; that said Dodge was not a manufacturer and did not expect to be one, and that the effect of said leases, practically, was to strip the defendant of the means of fulfilling its leases with your orators and others, and to make over to said Dodge the control of the manufacturing interests existing and to exist on the level of the canal to which said leases relates.

And your orators are informed and believe, and charge that, after said leases, a contract was made by the defendant with said Dodge, which is still in force, whereby he has become provisionally entitled to any and all waste water which may hereafter exist on said level, to any extent whatever, and without restriction as to the mode of drawing or the use to which it shall be applied; and that said Dodge has leased to divers parties several hundred inches of the water which the defendant pretended to lease to him as aforesaid, which water

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the said parties are now drawing and have been drawing for the past year and more.

12. That the business of the defendant consists, and for a number of years has consisted, almost exclusively in the transportation through its canal of coal from the coal regions of Maryland and Virginia to Georgetown and Alexandria for shipment; that through the gross neglect and mismanagement of the defendant it is and for years has been impossible to pass the coal-boats from the canal into Rock Creek, and thence into the Potomac River, although locks exist, built at immense expenses, for lowering boats from the level from which your orators draw, into Rock Creek, which locks are and have been for years past practically useless, in respect of said business, by the filling up of Rock Creek, so as to prevent the passage of the boats into the river, and that in consequence the defendant has for years past delivered the coal consigned to Georgetown, being the great bulk transported, and amounting last year to upwards of 600,000 tons, at said level to the consignees, and, to enable said consignees to unload the boats, has allowed the use of water for driving the requisite machinery, whereby a great waste of water has been incurred, to the great detriment of your orators and other millers, and in utter disregard of the obligations of the defendant, under its lessees, the quantity of water requisite thus to unload a boat being many times what would be used in passing his boats through the locks into the river and back.

13. That the defendant, through gross neglect and mismanagement, has suffered the dam and feeder and other works, whereby said
12 level is supplied with water, to fall into dilapidation and decay, whereby the head of water contemplated by said leases of your orators has been largely reduced.

14. That notwithstanding the premises, the defendant has caused to be served upon your orators a copy of a resolution adopted by its board of directors, which resolution of the 23d of February, 1865, required your orators to place their gauge and sliding gate at the canal bank, and also a letter from the president of the defendant, dated January 9th, 1873, and to the effect that if the requirements of said resolution are not complied with before the opening of navigation the water power of your orators' mill will be shut off. And your orators file herewith copies of said resolution and letter marked Ray & Bro., Exhibit No. 8, and Ray & Bro., Exhibit No. 9, and pray the same may be taken as part thereof. And they aver that said letter, although dated as aforesaid, was not, nor was the accompanying resolution, delivered to your orators until the 11th of February, 1873.

15. And your orators show that said gauge is rightfully at the wheel of their mill, being there in pursuance of the mutual action of your orators and said defendant in execution of the provisions of said leases, and that its said location has been ratified and confirmed by knowledge thereof and acquiescence therein on the part of the defendant for the period of thirteen years, and further by the agreement between your orators and said defendant, evidenced by the resolution of the 23d of February, 1865, and the acceptance thereof, which agreement your orators aver has been well and faithfully kept and observed on their part; and they deny that the claim to change or alter said gauge, now set up, has any foundation in said resolution, or in said leases, or that the re-
13 moval of said gauge is designed to prevent or lessen inconvenience to navigation or the use of the tow-path, or for the greater security of the canal or any of its works. On the contrary, they believe and charge that the defendant or officers thereof has or have combined and confed

erated with said Henry H. Dodge to oppress, harass, and annoy your orators and other millers for the purpose of compelling them to buy, in self-defence, water from said Dodge, which he possesses neither in law nor in fact, and thereby to pay the debt which, if valid, the defendant should have paid; and they aver that ever since said leases to said Dodge they have been subjected by the defendant to a series of unjust and uniformly have been, by the threat to shut off the water they have been compelled to yield, but that the claim now set up leaves your orators no alternative, except to seek the protection of this court and the judicial determination of their rights. They further show that to remove their gauge to the canal bank would be to deprive them of from thirty to forty per cent. of the water leases, or intended so to be, notwithstanding the concurrent action of your orators and the defendant, shows that the latter intended to deliver the quantity of water leased at the wheel, and free from the said deduction, and waived and dispensed with any provision in said lease to the contrary; that with said deduction the machinery of their mill, enlarged as aforesaid, cannot be driven; that said removal would, besides, involve the alteration of part of the fore-bay at great expense if your orators did not abandon their right to locate the gauge two feet from the bottom of canal proper, as they could not; and that even then to enable your orators to draw the quantity of water to which they are justly entitled, the said gauge would have to be greatly enlarged so as to give your orators the
14 equivalent of the water power leased by them, and for which they pay, and to make good the loss of head resulting from the said lease to Dodge, and the gross neglect and mismanagement of the defendant as aforesaid.

16. Your orators further show that the present capacity of their said mill is about two hundred barrels of flour of the best quality per day, or larger by more of inferior quality.

17. That navigation will open, as supposed, about the 12th of March, 1873, and that there is not time to make the alterations demanded, even if your orators were willing to make the same; that your orators have been provided with no official information as to what the defendant exacts, save the said resolution and letter, but are informed and believe that, wholly regardless of the aforesaid claims and considerations in behalf of your orators, it insists on the removal of said gauge and sliding gate to the canal bank, and that it be located at what it considers two feet from canal bottom proper, though, in fact, three feet, and be of the size designated by said leases, wholly regardless of the water power intended to accrue to your orators, and of the changed conditions, though such changed conditions be owing to its acts, neglect, and mismanagements, and that your orators failing to comply with said extravagant and outrageous demands, the defendant intends to shut off the water-power and thereby stop their mill until your orators shall conform to said demands.

18. Your orators further show that the defendant is and has been for many years utterly insolvent, and that the injury to result to them directly and prospectively from the threatened arbitrary conduct of the defendant would be wholly irremediable in a court of law.

15 To the end that the said defendant may answer the premises, and may be enjoined and prohibited from shutting off the water from the mill of your orators by reason of their refusal to conform to the requirements of said resolution dated the 12th of December, 1872, or by reason of their continuing to keep their gauge at the wheel and draw water for their mill through said gauge as heretofore, and that the

right of your orators so to draw at the wheel, and the manner of drawing, and the quantity of water to which your orators are entitled may be determined by the decree of this court, and that your orators may have such other and further relief as their case may require.

May it please the court to grant unto your orators the writ of injunction conformable to the above prayer, and also the writ of subpœna commanding, &c.

A. ROSS RAY,
ALBERT RAY,
By A. ROSS RAY.

W. D. DAVIDGE,
Solicitor for Complainant.

I do solemnly swear that I have read the foregoing bill by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the fact therein stated upon information and belief I believe to be true.

A. ROSS RAY.

Subscribed and sworn to before me this 26th day of February, A. D. 1873.

A. E. L. KEESE,
Notary Public.

Filed February 26th, 1873.

16 *Exhibit No. 1 to bill.—Filed Sept. 26, 1873.*

Articles of agreement made and concluded this seventh day of May, 1846, by and between the Chesapeake and Ohio Canal Company of the one part and George Bomford, of the county of Washington, in the District of Columbia, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, and on the part of the said party of the second part to be paid and performed, doth grant and agree to, and the said party of the second part and his assigns, that the said party of the second part and his assigns shall have full right, permission, and authority for the term of twenty years from the first day of January, 1839, and the same is hereby granted, to draw off from the Chesapeake and Ohio Canal, at Georgetown, in the District of Columbia, through the two circular outlets constructed for the purpose of a water-
17 weir by the said party of the first part, under the market in the said town (from the level between locks No. four and No. five), so much water as will pass through two apertures of equal size, formed in iron plates not exceeding one-half inch in thickness (one in each of the said circular outlets), the total area of which shall be four hundred and seventy-six square inches, estimating the said quantity of water to be so drawn off and leased as equal in quantity to what would pass through four hundred square inches of aperture of the form, and drawn in the mode usual on the said canal, to be used solely for propelling the machinery of a cotton, woolen, or other factory, or for propelling machinery applied to any manufacturing purpose whatever, except that of making gunpowder, as the said party of the second part or his assigns may fit, but on these express conditions, viz:

18 1st. That the said party of the first part shall have the right to diminish the said water-ways of the said circular outlets either along a part or the whole of their entire length as they may prefer, and

in such manner and upon such plan as they may see fit, to an area in the aggregate of not less than four hundred and seventy-six square inches, either immediately or at such time hereafter as it may suit their convenience to cause the same to be done, and may again, in their discretion, open the same to their present dimensions of five hundred and seventy-six square inches or less if they prefer, and so continue to reduce or enlarge the said water-ways from time to time whenever and as often as they may deem expedient.

2d. That the said party of the first part shall have the right at any and all times to use the said circular outlets or apertures in them as wastes for drawing down or off, through, and over the grounds of the said party of the second part, his heirs or assigns, to the natural outlet therefor to the river free of charge for thus passing the said water through and over the said grounds, and without subjecting the said party of the first part to any forfeiture of rents, unless the said party of the second part, or his assigns, should, in consequence thereof, be subjected to an entire suspension in the use of the water power hereby granted for a connected period of at least ten days; then, and in all such cases, a pro rata deduction shall be made from the rent for the days during which the said entire suspension continues.

3d. That the said apertures shall be made plain and square through the said plates, and that no device or contrivance shall ever be made therein or in any way attached to or connected therewith whereby a greater quantity of water can be drawn through the said apertures than if such device or contrivance had not been connected with or attached to the same.

4th. That a sliding gate or gates shall be placed in front of the said apertures and circular outlets, so that the whole water power hereby granted may be, as occasion under the provisions of this contract requires, entirely or partially stopped from passing through them.

5th. That the said apertures and sliding gate or gates shall be so constructed and put in as not to prevent or interfere with in any degree the navigation of the canal or the use of the towing path thereof; and that the said apertures and sliding gate or gates shall be of good and substantial construction and shall not occasion any leakage of the said canal, or in anywise endanger the security thereof, and shall be put in and constructed, and thereafter during the continuance of the said term kept in repair at the sole cost of the said party of the second part, or his assigns, under the special direction and superintendence, and subject in every particular to the approval of such officer of said party of the first part as may be charged with that duty.

6th. That in like manner, at the sole cost of the said party of the second part or his assigns and under the special direction, superintendence, and approval of such officer of the said party of the first part as may be charged with that duty, shall such alterations from time to time be made in the said apertures and sliding gate or gates as may be considered necessary by the said party of the first part, or their officers charged with that duty to prevent or lessen the inconvenience to the navigation of the said canal and the use of its towing path, which may be found to arise from the use of the said water, or that may be thought necessary by the said party of the first part for the greater security of the said canal or of its works.

7th. That the officers and servants of the said party of the first part with their horses and carts, shall have free ingress and egress to and from the premises, used and occupied by the said party of the second part, or his assigns at the point aforesaid for the purpose of examining,

repairing, and preserving the embankments and other parts of the said canal or its works without molestation or hindrance from any person whatever, and that the said officers and servants shall in like manner have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal, or endanger its security or that of its works or whether from any cause whatsoever there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite in the opinion of their officer charged with that duty, to draw off the water from the said canal for the purpose of cleaning, repairing, or altering the same or for any other necessary purpose and shall also be at liberty to keep the water out of the said canal after the occurrence of a breach or breaches in it or the failure of any of its works for the purpose of its or their repair without rendering the said party of the first part or their officers in any manner liable for damage for the failure of water at the point aforesaid while such cleaning, repairing, or alteration is in progress, or such necessity exists, or during the repairs rendered necessary by such breach or breaches or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connected period of at least ten days, then in all such cases a *pro rata* deduction shall be made from the rent for the rent for the days during which the water is so drawn off or remains out.

9th. That whenever the said party of the second part or his assigns suspend the use of the water power hereby granted in propelling his or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them and shall so remain tightly closed by him or them and shall so remain tightly closed until he or they shall have occasion to resume the use of the said water power (without being entitled in consequence to any abatement of rent), in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises for himself and his assigns, doth covenant and agree to and with the said party of the first part that he and his assigns during the continuance of the said term of years, commencing on the first day of January, 1839, as aforesaid, will pay for the use of the said water to the said party of the first part an annual rent of eight hundred dollars for the first ten years of the aforesaid, term and an annual rent of one thousand dollars for the succeeding ten years of said term, in equal quarter-yearly payments, viz, on the 31st day of March, thirtieth day of June, thirtieth day of September, and 31st day of December, in each and every year, and will abide by and perform each and all of the conditions and stipulations on his or their part to be performed under the aforesaid provisions.

And it is hereby mutually understood and agreed by and between the said parties that if any quarter-yearly payment of the said rent shall be in arrear twenty days after the period aforesaid stipulated for the payment of the same, or if the said party of the second part or his assigns shall fail to comply forthwith upon being required so to do by the party of the first part, or their officer charged with that duty, with any of the preceding conditions of this lease, or shall alter or enlarge the said forebay or trunk or aperture, or shall apply the water passing through the same to any other use and purpose than as aforesaid, without the

special consent of the said party of the first part signified in writing under their seal, then, and in either case, it shall be lawful for the said party of the first part or their officer charged with that duty to stop or cut off the supply of water at the point aforesaid, by closing the sliding gate or gates of the aperture aforesaid, or by any other means, without the abatement of the said rent until the said party of the second part or his assigns shall make amends or satisfy the said party of the first part in the particular complained of, after which the said water shall be permitted to flow as before, subject to all the limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect, or refusal to pay as aforesaid the quarter-yearly
28 rent in any instance for quarter of a year after the same shall have become due, then this lease may be forfeited and made void at the option of the party of the first part. These rights in the party of the first part to shut off the water and to forfeit and make void this lease, shall not be considered as excluding the party of the first part from the legal right of collecting the rent or from proceeding against the party of the second part and his assigns by suit, injunction, or otherwise.

And whereas the primary object of the Chesapeake & Ohio Canal is to afford navigation and means of easy transportation for produce and merchandise passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches, (with such depth of water as may be deemed expedient by the party of the
29 first part to be maintained therein for the purposes of said navigation,) and also to propel the machinery, it is further mutually understood and agreed between the said parties that whenever, in the opinion of the officer charged with that duty by the said party of the first part, the purposes of the navigation of the said canal and its branches as aforesaid require it, the said party of the first part or the said officer may, for the time in their or his opinion requisite, limit the quantity of water to be drawn from the said canal, according to the provisions of this contract at the point aforesaid, or altogether stop the same without liability to answer therefor in damages to the said party of the second part or his assigns. Provided, however, that the said quantities of water shall not be diminished or stopped at the point aforesaid, while water is permitted to pass at any other point dependent
30 on the same feeder for its supply for the purpose of propelling machinery under a water right or contract, the commencement of the term of which is later than the aforesaid first day of January, 1839. And in all cases of a partial or total suspension of the use of water from such a cause, a pro rata deduction (in part or in full as the case may be) shall be made from the rent for the days during which the use of the water is so suspended.

And the said party of the first part doth further covenant and agree to and with the said party of the second part, and his assigns, that the said party of the first part will hereafter, if requested within twenty days after the expiration of the term aforesaid by the said party of the second part or his assigns, renew this lease or contract for an-
31 other term of twenty years, on the same terms and conditions and subject to the same limitations as are herein contained; and so from time to time as the said renewed lease or contract shall expire, on condition of the said party of the second part or his assigns paying to the said party of the first part, at each renewal, a fine or bonus of one year's rent; (which fine or bonus will be on the first renewal one thousand dollars, and on each subsequent renewal twelve hundred dollars;)

repairing, and preserving the embankments and other parts of the said canal or its works without molestation or hindrance from any person whatever. and that the said officers and servants shall in like manner have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal, or endanger its security or that of its works or whether from any cause whatsoever there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite in the opinion of their officer charged with that duty, to draw off the water from the said canal for the purpose of cleaning, repairing, or altering the same or for any other necessary purpose and shall also be at liberty to keep the water out of the said canal after the occurrence of a breach or breaches in it or the failure of any of its works for the purpose of its or their repair without rendering the said party of the first part or their officers in any manner liable for damage for the failure of water at the point aforesaid while such cleaning, repairing, or alteration is in progress, or such necessity exists, or during the repairs rendered necessary by such breach or breaches or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connected period of at least ten days, then in all such cases a *pro rata* deduction shall be made from the rent for the rent for the days during which the water is so drawn off or remains out.

9th. That whenever the said party of the second part or his assigns suspend the use of the water power hereby granted in propelling his or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them and shall so remain tightly closed by him or them and shall so remain tightly closed until he or they shall have occasion to resume the use of the said water power (without being entitled in consequence to any abatement of rent), in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises for himself and his assigns, doth covenant and agree to and with the said party of the first part that he and his assigns during the continuance of the said term of years, commencing on the first day of January, 1839, as aforesaid, will pay for the use of the said water to the said party of the first part an annual rent of eight hundred dollars for the first ten years of the aforesaid, term and an annual rent of one thousand dollars for the succeeding ten years of said term, in equal quarter-yearly payments, viz, on the 31st day of March, thirtieth day of June, thirtieth day of September, and 31st day of December, in each and every year, and will abide by and perform each and all of the conditions and stipulations on his or their part to be performed under the aforesaid provisions.

And it is hereby mutually understood and agreed by and between the said parties that if any quarter-yearly payment of the said rent shall be in arrear twenty days after the period aforesaid stipulated for the payment of the same, or if the said party of the second part or his assigns shall fail to comply forthwith upon being required so to do by the party of the first part, or their officer charged with that duty, with any of the preceding conditions of this lease, or shall alter or enlarge the said forebay or trunk or aperture, or shall apply the water passing through the same to any other use and purpose than as aforesaid, without the

special consent of the said party of the first part signified in writing under their seal, then, and in either case, it shall be lawful for the said party of the first part or their officer charged with that duty to stop or cut off the supply of water at the point aforesaid, by closing the sliding gate or gates of the aperture aforesaid, or by any other means, without the abatement of the said rent until the said party of the second part or his assigns shall make amends or satisfy the said party of the first part in the particular complained of, after which the said water shall be permitted to flow as before, subject to all the limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect, or refusal to pay as aforesaid the quarter-yearly
28 rent in any instance for quarter of a year after the same shall have become due, then this lease may be forfeited and made void at the option of the party of the first part. These rights in the party of the first part to shut off the water and to forfeit and make void this lease, shall not be considered as excluding the party of the first part from the legal right of collecting the rent or from proceeding against the party of the second part and his assigns by suit, injunction, or otherwise.

And whereas the primary object of the Chesapeake & Ohio Canal is to afford navigation and means of easy transportation for produce and merchandise passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches, (with such depth of water as may be deemed expedient by the party of the
29 first part to be maintained therein for the purposes of said navigation,) and also to propel the machinery, it is further mutually understood and agreed between the said parties that whenever, in the opinion of the officer charged with that duty by the said party of the first part, the purposes of the navigation of the said canal and its branches as aforesaid require it, the said party of the first part or the said officer may, for the time in their or his opinion requisite, limit the quantity of water to be drawn from the said canal, according to the provisions of this contract at the point aforesaid, or altogether stop the same without liability to answer therefor in damages to the said party of the second part or his assigns. Provided, however, that the said quantities of water shall not be diminished or stopped at the point aforesaid, while water is permitted to pass at any other point dependent
30 on the same feeder for its supply for the purpose of propelling machinery under a water right or contract, the commencement of the term of which is later than the aforesaid first day of January, 1839. And in all cases of a partial or total suspension of the use of water from such a cause, a pro rata deduction (in part or in full as the case may be) shall be made from the rent for the days during which the use of the water is so suspended.

And the said party of the first part doth further covenant and agree to and with the said party of the second part, and his assigns, that the said party of the first part will hereafter, if requested within twenty days after the expiration of the term aforesaid by the said party of the second part or his assigns, renew this lease or contract for an-
31 other term of twenty years, on the same terms and conditions and subject to the same limitations as are herein contained; and so from time to time as the said renewed lease or contract shall expire, on condition of the said party of the second part or his assigns paying to the said party of the first part, at each renewal, a fine or bonus of one year's rent; (which fine or bonus will be on the first renewal one thousand dollars, and on each subsequent renewal twelve hundred dollars;)

and from and after renewal or reletting as aforesaid, the rent shall be at the rate of twelve hundred dollars per annum.

In witness whereof, the Chesapeake and Ohio Canal Company have caused their seal to be affixed, and the president of the said company has signed his name; and the party of the second part hath set his hand and seal, the day and year first above written.

Done in duplicate.

32 By order and in behalf of the board of president and directors.

{ SEAL CHES. & OHIO CANAL CO. } J. M. COALE,
President of the Ches. & Ohio Canal Co.
GEO. BOMFORD. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES B. FISK.
WM. TURNER,
Clerk Ch. & O. Ca. Co.

MEM.—The agreement for the use of the water stipulated for in the aforegoing lease was made prior to the first of January, 1839, from which time the term of said lease commences, although the same was never reduced to writing and formally executed until this seventh day of May, 1846.

J. M. COALE,
President, in behalf of the Board of President & Directors.
GEO. BOMFORD.

Witness:
CHARLES B. FISK.

33 *Exhibit No. 2 to bill of complaint.—Filed Feb'y* 26, 1873.

This indenture, made the ninth day of December, in the year 1846, between George Bomford of the first part, and Alexander Ray of the second part, both of the city of Washington:

Whereas the said party hereto of the first part, by lease or contract with the Chesapeake and Ohio Canal Company, is entitled to a water-right of four hundred inches or thereabouts, to be supplied by the said company from their said canal to the said party hereto of the first part for his manufacturing purposes intended to be carried on in the buildings erected and to be erected upon his lot of ground in Georgetown in the District of Columbia, being part of lot number seventy-nine in said original town, immediately south of the market-house; the grant of which water-right is for the term of twenty years, renewable forever, upon the terms specified in said lease or contract, which is hereby
34 referred to for more full information upon the subject, as well as for the annual rent to be paid to the said company for the said right, and for all the other terms, conditions, stipulations, and restrictions upon and under which the same is to be possessed and enjoyed by the said party hereto of the first part, his heirs and assigns. And whereas the said party hereto of the first part hath recently sold to the party hereto of the second part a portion of the said lot of ground, the same being the lower or southern portion thereof, and fronting forty feet or thereabouts upon Water street in the said town, and extending back with Potomac street sixty feet, or thereabouts, upon which the said party hereto of the second part intends to erect a mill; and the said party of the second part also agreed with the said party hereto of the first part, and as a part of such contract, and for one and the same consideration, for the purchase of one hundred inches absolutely
35 of his said water-right, and fifty inches of the same contingently, for the supply and operation of the said intended mill.

This indenture therefore witnesseth that, in consideration of the premises and of the sum of one dollar current money of the United States to the said party hereto of the first part in hand paid by the said party hereto of the second part before the execution of these presents (the receipt whereof is hereby acknowledged), he, the said party hereto of the first part, hath granted, bargained, sold, assigned and transferred, and by these presents, doth grant, bargain, sell, assign and transfer unto the said party hereto of the second part, his heirs and assigns, one hundred inches of the water-right above mentioned, granted or leased to him by the said canal company as aforesaid, to be furnished from the present forebay of the present cotton-mill or factory of the said
36 party hereto of the first part, through a circular orifice to be made in the said *of the said* forebay, the bottom of said orifice to be level with the top of the present thirty-feet water-wheel of the said mill or factory, and to be taken and conducted therefrom to the said intended mill of the said party hereto of the second part at his own cost and expense; or in his option, to be taken from the said canal in a trunk to be constructed at his own cost and expense: To hold, take and enjoy the said water-right with all the rights and privileges belonging to the same, and as now secured to and enjoined by the said party hereto of the first part, unto and by the said party hereto of the second part, his heirs and assigns, for all the term and time, and with the same right of renewal, now vested in the said party hereto of the first
37 part in and by the said lease or contract. Subject, nevertheless, as to the said quantity hereby assigned, to the payment to the said party hereto of the first part, his heirs or assigns, of the same rate or rates of annual rent per inch, and to the performance of the same covenants and agreements, and to all the same terms, conditions, remedies, stipulations, and restrictions that are expressed and reserved in and by the said lease or contract as to the said four hundred inches, and on the part of the said party hereto of the first part, his heirs and assigns, therein required to be done, performed, and observed, all of which shall be applicable to the said one hundred inches hereby granted as between the said parties hereto and their respective heirs and assigns, and shall and may be resorted to and exercised by the
38 said George Bomford, his heirs and assigns, as occasion may require. And for the considerations aforesaid the said party hereto of the first part hath granted, bargained, sold, assigned, and transferred, and by these presents doth grant, bargain, sell, assign, and transfer unto the said party hereto of the second part, his heirs and assigns, fifty inches of said water-right additional to said one hundred inches above granted and sold, to be supplied or taken in the same way or mode, and to be subject to the same rate of rent payable as aforesaid, and to all the same covenants, agreements, terms, stipulations, conditions, remedies, and restrictions that attend the said one hundred inches, and that are contained in said lease or contract. But the grant or sale hereby made of the said additional fifty inches are upon this condition, that the said party hereto of the second part, his heirs and assigns, shall use and enjoy the same no longer than he can obtain
39 a grant of fifty inches of water for his said intended mill from the said canal company; and for that purpose he and they shall, whenever there is a probability of the same being obtained, apply to the said canal company therefor, and obtain a grant thereof if the said company shall be willing to make the same, and immediately upon obtaining such right, the grant or sale of the said fifty additional inches hereby made shall cease and be void. But if the said party hereto of

the second part, his heirs or assigns, cannot obtain such grant from the said company, he and they shall have full power and authority to use the said fifty additional inches for the use of the said mill upon the terms aforesaid, until the same can be obtained from the said company. And the said party hereto of the first
40 part doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the party hereto of the second part, his heirs and assigns, that he, the said party hereto of the first part, his heirs and assigns, shall and will, at all times hereafter, duly pay the said annual rent reserved in and by the said lease or contract to the said canal company; and that he and they shall not, at any time or times hereafter, do, or permit to be done, any act, matter, or thing, to forfeit the said lease or contract from or with the said company for the said water-right, or in any manner to impair or affect the same, or the enjoyment thereof, to the extent of one hundred and fifty inches, subject to the condition above expressed; and that he and they shall and will at all times during the continuance of the
41 said lease, and all renewals thereof, permit the said party hereto of the second part, his heirs and assigns, to take said one hundred and fifty inches of water, subject as aforesaid, from the forebay of his mill or factory, as above granted and expressed, without any hindrances or obstructions whatsoever, other than those which may arise out of the said original lease or contract, or the want of a full and free supply of water from the said canal. And the said party hereto of the second part doth hereby, for himself, his heirs, executors, and administrators, covenant, agree to and with the said party hereto of the first part, his heirs and assigns, that he and they shall and will, at all times hereafter, during the said lease, and all renewals thereof, pay to the said party hereto of the first part, his heirs and assigns, a due proportion of
42 the annual rent for the use of the water-right hereby granted, according to the rates reserved by the said company in the said lease; and also bear an equal share (in proportion as the water used by him and them shall bear to the whole quantity granted as aforesaid) of the expense of the repairs to and re-erecting of the said forebay, trunk, and pen-stock, and of all expenses attendant upon the conducting of the said water through the premises, so long as the party hereto of the second part, his heirs or assigns, shall draw or take therefrom the said quantity of water for the said intended mill; and further that he and they shall during all of the said time afford a full and free passage for the water from the said mill and works of the said party hereto of the first part across the said parcel of ground hereby recited to have
43 been sold to the said party of the second part, and do no act whatsoever, nor permit any to be done, whereby the passage of the said water, and of the water and fifth of said sewer, can in any manner be obstructed or hindered.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

GEO. BOMFORD. [SEAL]
ALEX. RAY. [SEAL.]

Signed, sealed, and delivered by the said George Bomford in the presence of—

WILLIAM WATERS.
H. C. WILLIAMS.

Signed, sealed, and delivered by the said Alex'r Ray in the presence of—

W. REDIN.

44 DISTRICT OF COLUMBIA,
Washington County, to wit:

We, William Waters and H. C. Williams, justices of the peace in and for the county aforesaid, do hereby certify that George Bomford, party to the foregoing deed, bearing date this 9th day of December, 1846, and hereunto annexed, personally appeared before us in our said county on the day of the date hereof, he being personally well-known to us as the person who executed the said deed, and the said George Bomford did then and there, in our presence, execute and acknowledge the same as and for his act and deed.

Given under hands and seals this 9th day of December, 1846.

WILLIAM WATERS, *J. P.* [SEAL.]
H. C. WILLIAMS, *J. P.* [SEAL.]

45 (Endorsed:)

I, Thomas Wilson, of the city of Baltimore, in the State of Maryland, do hereby recognize the within assignment from George Bomford to Alexander Ray as in all respects valid; and do hereby confirm the same, and all the rights thereby intended to be confirmed and conveyed to the said Alexander Ray, as if the said instrument was my own act and deed.

Witness my hand and seal this 8th day of January, 1855.

THOS. WILSON. [SEAL.]

Assented to by the pres. & directors of the Ches. & Ohio Canal Co., April 5, 1860.

W. S. RINGGOLD,
Clerk C. & O. C. Co.

Witness:
WM. C. HACKARAN.

46 *Exhibit marked R. & Bro., No. 3.*

Articles of agreement made and concluded this first day of May, in the year eighteen hundred and sixty, by and between the Chesapeake and Ohio Canal Company, of the one part, and of the second part, witnesseth:

That the said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, and on the part of the said party of the second part, to be paid and performed, doth grant and agree to and with the said party of the second part and his assignee, that the said party of the second part and his assignee shall have full right, permission and authority for the term of years, from the day of 18 , and the same is hereby granted, to draw off from the Chesapeake and Ohio Canal, at his mill at Georgetown, D. C. (from the level between locks No. four and five), so much water as will pass through an aperture of square inches, in an iron plate not exceeding an half-inch in thickness—to be used solely for propelling the machinery of a flouring and grist mill, and appurtenant works; but on these express conditions, viz:

1st. That the said aperture shall form an opening in the said plate of as many inches in height, and as many inches in length in the clear, as may be necessary to make out the number of square inches as aforesaid (——00.)

47 2d. That said aperture shall be so placed that its lower edge shall not be nearer to canal bottom proper than two feet.

3d. That said aperture shall be made plain and square through the

said plate, and that no device or contrivance shall ever be made therein, or in any way attached to or connected therewith, whereby a greater quantity of water can be drawn through the said aperture than if such device or contrivance had not been connected with or attached to the same.

4th. That a sliding gate or gates shall be placed in front of said aperture, so that the whole water-power hereby granted may be, as occasion under the provisions of his contract requires, entirely or partially stopped from passing through it.

5th. That the forebay or trunk for conducting the said water through the canal-bank from the said aperture shall be covered or bridged, and, together with the said aperture and sliding gate or gates, shall be so constructed and put in as not to prevent navigation of the canal or the use of the towing-path thereof; and that the said forebay or trunk, cover or bridge, aperture and sliding gate or gates shall be of good and substantial construction, and shall not occasion any leakage of the said canal, or in any wise endanger the security thereof, and shall be put down and constructed, and thereafter during the continuance of the term kept in repair at the sole cost of the said party of the second part, or his assignee, under the special direction and superintendence, and subject in every particular to the approval of such office, of the said party of the first part as may be charged with that duty.

6th. That, in like manner, at the sole cost of the said party of
48 the second part, or his assigns, and under the special direction, superintendence and approval of such office' of the said party of the first part as may be charged with that duty, shall such alterations from time to time be made in the said forebay or trunk, cover or bridge, aperture and sliding gate or gates as may be considered necessary by the said party of the first part, or their officer charged with that duty, to prevent or lessen the inconvenience to the navigation of the said canal and the use of its towing-path, which may be found to arise from the use of the water, or that may be thought necessary by the said party of the first part for the greater security of the canal or of its works.

7th. That the officers and servants of the said party of the first part, with their horses and carts, shall have free ingress and egress to and from the premises used and occupied by the said party of the second part, or his assigns, at the point aforesaid, for the purpose of examining, repairing, and preserving the embankments and other parts of said canal or its works, without molestation or hindrance from any person whatever; and that the said officers and servants shall in like manner have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid, for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal or endanger its security or that of its works, or whether, from any cause whatsoever, there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite in the opinion of their officers charged with such duty, to draw off the water from the said canal, for the purpose of cleaning, repairing, or altering the same, or for any other neces-
49 sary purpose, and shall be at liberty to keep the water out of the canal after the occurrence of a break or breaks in it, or the failure of any of its works, for the purpose of its or their repair, without rendering the said party of the first part or their officers in any manner

liable for damages for the failure of water at the points aforesaid while such cleaning, repairing, or alteration is in progress, or such necessity exists, or during the repairs rendered necessary by such break or breaks or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connective period of at least ten days; then, and in all such cases, a pro rata deduction shall be made from the rents for the days during which the water is so drawn off or remains out.

9. That wherever the said party of the second part or his assigns suspend the use of the water power hereby granted in propelling his or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them until he or they have occasion to resume the use of the said water-power (without being entitled, in consequence, to any abatement of rent) in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises for himself and his assigns, doth covenant and agree, to and with the said party of the first part, that he and his assigns during the continuance of the said term of years, commencing on the day of 18 , as aforesaid, will pay for the use of the said water, to the said party of the first part, an annual rent of $ dollars for the first years of the aforesaid term, an annual rent of $ dollars for the succeeding years of said term, in equal quarter-yearly payments, viz: on the day of and day of and day of in
50 each and every year, and will abide by and perform each and all of the conditions and stipulations on his or their part to be performed under the aforegoing provisions.

And it is hereby mutually understood and agreed by and between the said parties, that if any quarter-yearly payment of the said rent shall be in arrear days after the period aforesaid, stipulated for the payment of the same, or if the said party of the second part and his assigns shall fail to comply forthwith, upon being required so to do by the party of the first part or their officer charged with that duty, with any of the preceding conditions of this lease, or shall alter or enlarge the said forebay or trunk, or aperture, or shall apply the water passing through the same to any other use or purpose than as aforesaid, without the special consent of the said party of the first part, signified in writing under their seal, then, and in either case, it shall be lawful for the said party of the first part, or their officer charged with that duty, to stop or cut off the supply of water at the point aforesaid by closing gate or gates of the aperture aforesaid, or by any other means, without the abatement of the said rent until the said party of the second part or his assigns shall make amends or satisfy the said party of the first part in the particular complained of; after which the said water shall be permitted to flow as before, subject to all limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect or refusal to pay, as aforesaid, the quarter-yearly rent in any instance, for one quarter of a year after the same shall have become due, then this lease may be forfeited and made void, at the option of the party of the first part. These rights in the party of the first part to shut off the water, and to forfeit and make void this lease, shall not be considered as excluding the party of the first part from the legal rights
51 of collecting the rent or from proceeding against the party of the second part and his assigns by suit, injunction, or otherwise.

And whereas the primary object of the Chesapeake and Ohio Canal

is to afford navigation, and the means of easy transportation for produce and merchandise passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches (with such depth of water as may be deemed expedient by the party of the first part to be maintained therein for the purpose of said navigation), and also to propel machinery; it is further mutually understood and agreed, between the said parties, that whenever in the opinion of the officer charged with that duty by the said party of the first part, the purposes of the navigation of said canal and its branches, as aforesaid, require it, the said party of the first part, or the officer, may for the time, in their or his opinion requisite, limit the quantity of water to be drawn from the said canal according to the provisions of this contract, at the point aforesaid, or altogether stop the same without liability to answer therefor in damages to the said party of the second part or his assigns: Provided, however, that the said quantity of water shall not be diminished or stopped at the point aforesaid while water is permitted to pass at any other point, dependent on the same feeder for its supply for the purpose of propelling machinery, under a water right or contract, the commencement of the term of which is later than the aforesaid day of , in the year eighteen hundred and .

And in all cases of a partial or total suspension of the use of water from such a cause a pro rata deduction (in part or in full, as the case may be) shall be made from the rent for the days during which the use of the water is so suspended.

52 And the said party of the first part doth further covenant and agree to and with the said party of the second part and his assigns, that the said party of the first part will hereafter, if requested within days after the expiration of the term aforesaid, by the said party of the second part, or his assigns, renew this lease or contract for another term of years, on the same terms and conditions, and subject to the same limitations, as are herein contained; and so from time to time as the said renewed lease or contract shall expire, on the condition of the said party of the second part, or his assigns, paying to the said party of the first part at each renewal a fine or bonus of one year's rent (which fine or bonus will be on the first renewal six hundred dollars, and on each subsequent renewal six hundred dollars): and, from and after renewal or reletting as aforesaid, the rent shall be at the rate of six hundred dollars per annum.

In witness whereof, the Chesapeake and Ohio Canal Company have caused their seal to be affixed, and the president of the said company has signed his name; and the party of the second part hath set his hand and seal the day and year first above written. Done in duplicate.

(Signed)

President of the Chesapeake and Ohio Canal Company.

{ Seal Chesapeake and Ohio Canal Co. } (Signed)

Signed, sealed and delivered in the presence of—

Clerk C. & O. C. Co.

53 *Exhibit No. 4 to bill of complaint.—Filed Feb'y 26, 1873.*

Articles of agreement made and concluded this first day of May,

1860, by and between the Chesapeake and Ohio Canal Company, of the one part, and Alexander Ray, of Washington, D. C., assignee on part of lease heretofore made to Geo. Bomford of the second part, witnesseth:

That the said party of the first part for and in consideration of the rents and covenants hereinafter mentioned, and on the part of the said party of the second part, to be paid and performed, doth grant and agree to and with the said party of the second part and assigns, that the said party of the second part and assigns shall have full right, permission and authority, for the term of twenty years, from the first day of January in the year 1859, and the same is hereby granted, to
54 draw off from the Chesapeake and Ohio Canal at mill at Georgetown, D. C. (from the level between locks No. four and No. five), so much water as will pass through an aperture of one hundred square inches, in an iron plate not exceeding an half inch in thickness, to be used solely for propelling the machinery of flour and grist mill and appurtenant works; but on these express conditions, viz:

1st. That the said aperture shall form an opening in the said plate of as many inches in height, and as many inches in length, in the clear, as may be necessary to make out the number of square inches aforesaid (100).

2d. That the said aperture shall be so placed that its lower edge shall not be nearer to canal bottom proper than two feet.

3d. That the said aperture shall be made plain and square through the said plate, and that no device or contrivance shall ever be
55 made therein or in any way attached to or connected therewith, whereby a greater quantity of water can be drawn through the said aperture, than if such device or contrivance had not been connected with or attached to the same.

4th. That a sliding gate or gates shall be placed in front of the said aperture, so that the whole water-power hereby granted may be, as occasion under the provisions of this contract requires, entirely or partially stopped from passing through it.

5th. That the forebay or trunk for conducting the said water through the canal bank from the said aperture shall be covered or bridged, and together with the said aperture, and sliding gate or gates, shall be so constructed and put in as not to prevent or interfere with, in any degree, the navigation of the canal or the use of the towing-path
56 thereof; and that the said forebay or trunk, cover or bridge, aperture and sliding gate or gates, shall be of good and substantial construction, and shall not occasion any leakage of the said canal, or in any wise endanger the security thereof; and shall be put down and const'ucted, and thereafter, during the continuance of the said term, kept in repair at the sole cost of the said party of the second part or his assigns, under the special direction and superintendence, and subject in every particular to the approval of such officer of the said party of the first part as may be charged with that duty.

6th. That in like manner, at the sole cost of the said party of the second part or his assigns, and under the special direction, superintendence, and approval of such officer of the said party of the first part
57 as may be charged with that duty, shall such alterations, from time to time be made in the said forebay or trunk, cover or bridge aperture and sliding gate or gates as may be considered necessary by the said party of the first part, or their officer charged with that duty, to prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing-path, which may be found to arise from the use of the said water, or that may be thought necessary by the said

party of the first part for the greater security of the said canal or of its works.

7th. That the officers and servants of the said party of the first part, with their horses and carts, shall have full ingress and egress to and from the premises used and occupied by the said party of the second part, or his assigns, at the point aforesaid, for the purpose of ex-
58 amining, repairing, and preserving the embankments and other parts of the said canal or its works, without molestation or hinderance from any person whatever; and that the said officers and servants shall in like manner have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid, for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal or endanger its security, or that of its works, or whether from any cause whatsoever there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite, in the opinion of their officer charged
59 with such duty, to draw off the water from the said canal, for the purpose of cleaning, repairing or altering the same, or for any other necessary purpose, and shall also be at liberty to keep the water out of the said canal after the occurrence of a breach or breaches in it, or the failure of any of its works, for the purpose of its or their repair, without rendering the said party of the first part, or their officers, in any manner liable for damage for failure of water at the point aforesaid, while such cleaning, repairing or alterations is in progress, or such necessity exists, or during the repairs rendered necessary by such breach or breaches, or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connected period of at least ten days; then
60 and in all such cases a pro rata deduction shall be made from the rent for the days during which the water is so drawn off or remains out.

9th. That whenever the said party of the second part, or his assigns, suspend the use of the water-power hereby granted in propelling his *and* or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them, and shall so remain tightly closed until he or they have occasion to resume the use of the said water-power (without being entitled in consequence to any abatement of rent), in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises, for himself and his assigns, doth covenant and agree to and with
61 the said party of the first part, that he and his assigns during the continuance of the said term of years, commencing on the first day of January, 1859, as aforesaid, will pay for the use of the said water, to the said party of the first part, an annual rent of three hundred dollars for the first ten years of the aforesaid term, and an annual rent of three hundred dollars for the succeeding ten years of said term, in equal quarter-yearly payments, viz, on the thirty-first day of March, thirtieth of June, thirtieth of September, and thirty-first of December, in each and every year, and will abide by and perform each and all of the conditions and stipulations on his or their part to be performed under the aforegoing provisions.

And it is hereby mutually understood and agreed by and between the said parties, that if any quarter-yearly payment of the said
62 rent shall be in arrear twenty days after the period aforesaid

stipulated for the payment of the same, or if the said party of the second part, and assigns, shall fail to comply forthwith, upon being required so to do by the party of the first part, or their officer charged with that duty, with any of the preceding conditions of this lease, or shall alter or enlarge the said forebay or trunk, or aperture, or shall apply the water passing through the same to any other use or purpose than aforesaid, without the special consent of the said party of the first part, signified in writing under their seal, then, and either case, it shall be lawful for the said party of the first part, or their officer charged with that duty, to stop or cut off the supply of water at the point aforesaid, by closing the sliding gate or gates of the aperture aforesaid,
63 or by any other means, without the abatement of the said rent until the said party of the second part or his assigns shall make amends or satisfy the said party of the first part, in the particular complained of; after which, the said water shall be permitted to flow as before, subject to all the limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect or refusal to pay as aforesaid the quarter-yearly rent in any instance, for one-quarter of a year the same shall have become due, then this lease may be forfeited and made void, at the option of the party of the first part. These rights in the party of the first part to shut off the water and to forfeit and make void this lease shall not be considered as excluding the party of the first part from the legal right of collect-
64 ing the rent, or from proceeding against the party of the second part and his assigns, by suit, injunction, or otherwise.

And whereas the primary object of the Chesapeake & Ohio Canal is to afford navigation and the means of easy transportation for produce and merchandize passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches (with such depth of water as may be deemed expedient by the party of the first part to be maintained therein for the purposes of said navigation), and also to propel machinery, it is further mutually understood and agreed between the said parties that whenever, in the opinion of the officer charged with that duty by the said party of the first part, the purposes of the navigation of said canal and its branches as afore-
65 said require it, the said party of the first part, or the said officer, may, for the time, in their or his opinion requisite, limit the quantity of water to be drawn from the said canal according to the provisions of this contract, at the point aforesaid, or altogether stop the same, without liability to answer therefor in damages to the said party of the second part or his assigns: Provided, however, That the said quantity of water shall not be diminished or stopped at the point aforesaid while water is permitted to pass at any other point dependent on the same feeder for its supply for the purpose of propelling machinery under a water-right or contract, the commencement of the term of which is later than the aforesaid first day of January, 1839. And in cases of a partial or total suspension of the use of water from such a cause,
66 a pro rata reduction (in part or in full, as the case may be) shall be made from the rent for the days during which the use of the water is so suspended.

And the said party of the first part doth further covenant and agree to and with the said party of the second part and his assigns that the said party of the first part will hereafter, if requested within twenty days after the expiration of the term aforesaid by the said party of the second part or his assigns, renew this lease or contract for another

term of twenty years on the same terms and conditions and subject to the same limitations as are herein contained, and so from time to time as the said renewed lease or contract shall expire, on the condition of the said party of the second part or his assigns paying to the said party of the first part at each renewal a fine or bonus of one year's rent,
67 (which fine or bonus will be on the first renewal three hundred dollars, and on each subsequent renewal three hundred dollars;) and from and after renewal or reletting as aforesaid the rent shall be at the rate of three hundred dollars per annum.

In witness whereof The Chesapeake and Ohio Canal Company have cause' their seal to be affixed, and the president of the said company has signed his name, and the party of the second part has set his hand and seal the day and year first above written.

Done in duplicate.

L. J. BRINGLE, [SEAL.]
President of the Chesapeake & Ohio Canal Company.
ALEX. RAY. [SEAL.]

Signed, sealed, and delivered in presence of—
Attest:
W. S. RINGGOLD,
Clk C. & O. C. Co.

68 *Exhibit, marked R. & Bro., No. 5.*

At a meeting of the president and directors of the Chesapeake and Ohio Canal Company, on the 23d of February, 1865, the following resolution was adopted:

Resolved, That the superintendent of the Georgetown division, under the direction of W. E. Smith, C. E., be directed to place the water-gauges for the mills at Georgetown at such points as may be deemed most advisable to effect the objects of the respective water grants, and to limit the flow of water to the quantity to which the lessees are severally entitled: Provided, That said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them; and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, as contemplated by the lease, and that this resolution shall not, in any manner, change or impair the provisions or requirements of the respective leases granted to said parties.

Attest:
(Signed) W. S. RINGGOLD,
Clerk and Treas.

We, the undersigned, holding water leases from the Chesapeake and Ohio Canal Company, do hereby assent to the provisions of the aforegoing resolutions, and request that the water-gauges be placed upon our respective premises at or near the water-wheel.

February, 1865.

(Signed) GEO. SHOEMAKER & CO.
A. ROSS RAY & BRO.
HERR & WELCH.
D. S. SHOEMAKER & BRO.
W. YOUNG.
JOHN DAVIDSON.

Filed.

69 *Exhibit R. & Bro., No. 6.*

Chesapeake & Ohio Canal Co. to Henry H. Dodge.—Lease.—Recorded March 16, 1870—2.15 p. m.

These presents, made and concluded this 17th day of February, 1870, by and between the Chesapeake & Ohio Canal Co., of the first part, and Henry H. Dodge, of Georgetown, D. C., of the second part, witness:

That for and in consideration of a compromise of the existing dispute between the said company and the said Dodge, and of a cancellation of the leases and contracts by and between the said company and the said Dodge, dated Nov'r 9 and Dec'r 28, 1865, and June 1st, 1866, with the various supplements thereto respectively, and of a release of all claims arising thereunder on either side, hereby mutually agreed to and declared to be made, and in further consideration of the surrender to the party of the first part by the party of the second part of
70 his maps, surveys, and reports, in relation to the repair and improvement of dam No. 1, and the works connected therewith on the Georgetown level of said canal, and of the further consideration of the rents and covenants hereinafter mentioned on the part of the said party of the second part and his heirs, representatives and assigns, to be paid and performed, as well as of the sum of five dollars, the receipt of which is hereby acknowledged, the said party of the first part hereby covenants and agrees that the existing grants of waste or surplus water-power at Georgetown, D. C., yielding rents, shall be assumed as the maximum of the waste or surplus water and water-power now disposable there, or on the said level, and on that basis the party of the first part hereby leases, grants, bargains, sells and conveys unto the party of the second part, his heirs, representatives and assigns, the waste or surplus water on the Georgetown level below dam No. 1, over
71 and above the said maximum to the extent of and not to exceed fifteen hundred inches, now existing or which may hereafter be gained or made on the Georgetown level by repairing dam No. 1, and restoring it and the works on said level connected therewith to their original condition, or which may be gained or made from time to time on said level, by any subsequent legislation authorizing further repairs or improvements or increase of water or surplus water or of water-power thereon, at the fixed and only rate of twenty-five cents per inch, canal measurement, per annum for the term of fifty years commencing from the date hereof, renewable hereafter for like periods or terms of years from time to time forever, at the first and only rate of fifty cents per inch, canal measurement, per annum, the same to be had and taken by the said Henry H. Dodge, his heirs, representatives, and assigns, at a point or points along or below the line of the premises leased
72 by said company to said Dodge by indenture bearing even date herewith; and the said party of the first part hereby further covenants and agrees with the said party of the second part, his heirs, representatives and assigns, that he and they shall always be entitled as first purchasers on the terms aforesaid to the extent of, but not to exceed fifteen hundred inches of the first waste or surplus water or water-power on said level over and above said maximum, in such portions and at such times as it can be disposed of without detriment to the navigation of said canal, provided that this is not to be construed as a guaranty on the part of the company that said surplus shall reach any given amount.

And the said party of the first part further covenants and agrees with the

party of the second part, his heirs, representatives and assigns, that the said company for the common benefit shall and will in all present
73 and in all future leases or privileges for the use of waste or surplus water or water-power made or to be made by it on said level, cause the quantity of water so sold or used to be accurately measured through fixed guages; and further, that the said company will not arbitrarily or capriciously use their feed gates in such a way as to prevent the full and fair enjoyment by the party of the second part, his heirs, representatives, and assigns, of all the rights and privileges herein granted or so as to interfere with the execution of the true spirit and bona fide intention of this compromise hereby made, and all the privileges hereby granted; and the said party of the second part, for and in consideration of the premises, for himself, his heirs, representatives and assigns, covenants and agrees with the party of the first part that he and they will at all times during the continuance of this lease or grant, and the renew-
74 als thereof, take and accept all such waste or surplus water or water-power to the extent of and not exceeding fifteen hundred inches, as may be set off or measured to him or them, th'ough the fixed guages aforesaid, according to the provisions hereof; and further, that he and they shall and will pay on the first day of January, 1871, and on the same day in each and every year thereafter, during the period aforesaid, for the same or for such portion of said fifteen hundred inches as may be set off or measured, at the rates before stipulated, and that in failure to pay for the same as agreed, it shall and may be lawful for the said party of the first part, in addition to the usual legal remedies for the collection thereof, to shut off the supply of water hereby agreed to be made, from each and every guage on which there is a fail-
ure to pay for the water supplied thereat, and to refuse to supply
75 any further water through such guages until all such arrears for water supplied at such guages shall be fully paid; and the party of the first part further covenants and agrees with the said Henry H. Dodge, his heirs, representatives and assigns, that at any time during the continuance of the lease, or grant, or any renewal thereof, on the payment to it of ten dollars as a renewal fee, it will execute and deliver, or cause to be executed and delivered to the said Dodge, his heirs, representatives, or assigns, at his, her, or their request, a renewal of these presents on the term herein provided for, for another term of fifty years, so that the same may be renewable and renewed from time to time forever.

These presents further witness that the said Chesapeake and Ohio Canal Company has constituted and appointed, and does hereby
76 constitute and appoint Isaiah H. Gordon to be its attorney for it and its name, and as its act and deed, to acknowledge the instrument of writing before any person or persons having authority by law to take the said acknowledgment, in order that the same may be recorded.

In testimony whereof the said party of the first part has caused its corporate seal to be hereto affixed and these presents to be signed by its president.

ISAIAH H. GORDON, [SEAL.]
President of the Chesapeake & Ohio Canal Co.
HENRY H. DODGE. [SEAL.]

Test:
D. C. THOMPSON,
BENJ'N FAWCETT,
C'k & Treas'r.

STATE OF MARYLAND,
Anne Arundel County, set:

We, D. C. Thompson and James C. Welch, justices of the peace, in in and for the county of Anne Arundel aforesaid, in the State of Maryland, do certify that the Chesapeake and Ohio Canal Company, a
77 party to certain deed bearing date the 17 day of February, 1870, and hereto annexed, by Isaiah H. Gordon, its president and attorney named in the said deed, for the purpose of acknowledging the same for and in the name of the within named lessor, appeared before us in our county aforesaid, the said Isaiah H. Gordon being proved by the oaths of creditable witnesses before us to be the president and attorney aforesaid, and to be the same who signed the said deed as president of said company, and the said Isaiah H. Gordon, for and in the name of the said company, acknowledged the same to be the act and deed of the said Chesapeake & Ohio Canal Co., and at the same time before us also personally appeared Henry H. Dodge, a party to the said deed, the said Henry H. Dodge being proved by the oaths of creditable witnesses before us to be the person who executed the said deed, and ac-
78, 79 knowledged the same to his act and deed.

Given under our hands and seals this 17th day of February, 1870.

D. C. THOMPSON, *J. P.* [SEAL.]
JAMES C. WELCH, *J. P.* [SEAL.]

STATE OF MARYLAND,
Anne Arundel County, set:

I hereby certify that D. C. Thompson and James C. Welch, esquires, before whom the annexed acknowledgments were made and who have thereto subscribed their names, were at the time of so doing, justices of the peace of the State of Maryland, in and for Anne Arundel County, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the circuit court for Anne Arundel County this 17th day of February, 1870.

[COUNTY SEAL.] SPRIGG HARWOOD,
Clk of the Circuit Court for A. Arundel Co.

[Stamp, 5 c'ts.]

80 ANNAPOLIS, *March* 4, 1870.

At a meeting of the president and directors of the Ches. & Ohio Canal Co., held on the 17th of February, 1870, the following resolution was offered and adopted:

Resolved, That the lease of waste or surplus water on the Georgetown level, the lease of lands above Georgetown, and the surrender of leases and the contract between the Ches. & Ohio Canal Co. and Henry H. Dodge, just read to the board, be affirmed, and the president be instructed to execute the same on behalf of said company.

Then, upon the same day, after the execution of the above described instruments, the following resolution was offered and adopted:

Resolved, That the lease of water or surplus water or water power on the Georgetown level, between the Ches. & Ohio Canal Co. and Henry
H. Dodge, and the lease of said company to said Dodge of
81 certain lands between the said canal and Potomac River above Georgetown, and the surrender of leases dated November 9th and December 28, 1865, and of a contract dated June 17, 1866, executed by the president under instructions from this board and submitted

to the same, be and the same are respectively hereby accepted, ratified, and confirmed.

I certify that the foregoing resolutions are true and correct copies from the journal of proceedings.

Attest:

[CORPORATE SEAL.] BENJ. FAWCETT,
Clk & Treas.

82 *Exhibit R. & Bro. No. 7.*

Chesapeake & Ohio Canal Co. to Henry H. Dodge.—Lease.—Recorded March 16, 1870—2.15 p.m.

* * * * * * *

The said party of the first part doth hereby lease and demise to the said Henry H. Dodge, his heirs, representatives, and assigns, all the land owned by said company situate and lying at and adjacent to Georgetown, D. C., aforesaid, between their canal and the Potomac River, bounded on the east by the western side of the northern abutment of the Alexandria Aqueduct, and on the west by the property formerly owned by Mason and known as the Founding, the said land having an extended front upon said river of about twelve hundred feet, with all their right, title, and estate therein, and secondly, all the land owned by said company between the canal and Potomac River above said
83 Georgetown, bounded on the east by the western line of Foundry property as agreed upon between Gen. John Mason and said company, and on the west by a line drawn across said property from the canal to the river at the distance of fifteen hundred feet west from the said western line of said Foundry property. To have and hold the said two above described premises, with the rights and appurtenances thereto belonging to the said Henry H. Dodge, his heirs, representatives and assigns, from the first day of March, 1870, for and during the full term of fifty years, yielding and paying therefor an annual rent of one hundred dollars payable on the first day of March in each and every year thereafter: Provided, That if the said company at any time during the continuance of the lease or any renewal thereof should wish and be prepared to build any outlet lock on the premises herein last described west of the
84 Foundry property, then so much of the same as may be necessary therefor shall be reserved and saved from the operation of this lease; provided further, that written notice be given of such intention to said Dodge, and that said outlet lock be commenced within three months from such notice and prosecuted thereafter with due diligence to completion; and provided further, that if said Dodge, his heirs, representatives, or assigns, shall at any time give written notice to said company that he or they intend and are prepared to put any improvements on said tract, that the said company shall then determine within three months whether or not it intended and was prepared to build said outlet lock as aforesaid, and in case of its declension and the execution of any improvements by the party of the second part, the said company not thereafter to have the said privilege.

85 It is further covenanted and agreed by and between the parties hereto that at the expiration of the said term of fifty years the said Dodge, his heirs, representatives, and assigns shall have the privilege of renewing the said lease for like periods and terms of years thereafter, from time to time forever, at the yearly rent of two hundred dollars per annum, and further, that if said lease should not be so renewed the said Dodge, his

heirs, representatives, and assigns shall be entitled to payment and compensation from said company for such improvements, or may be left by him or them upon said premises, according to such valuation of the same as may be mutually agreed upon, or in case of disagreement, as may be determined by referees, one to be chosen by said company, one by said Dodge, his heirs, representatives, or assigns, and a third by the referees so chosen. It it is further covenanted and agreed by the said
86 company that during the continuance of this lease or any renewal of the same they will keep and maintain their towing path on the northern side of said canal between the Foundry culverts, the point of crossing and the Alexandria Aqueduct, so as to allow to said Dodge, his heirs, representatives, and assigns the free and unobstructed use of the berme bank or former towing path and all the land hereby used. It is hereby further covenanted and agreed that if at any time there shall be a failure and refusal to pay the yearly rent reserved as aforesaid, and the same shall be in arrears for the period of six months, the said company in addition to their usual legal remedies for the recovery of said rent shall have the privilege, after a written demand for said rent and a refusal to pay the same, of declaring this lease forfeited and void,
87 and of re-entering upon said premises, as if said lease had expired. And the said Henry H. Dodge hereby covenants and agrees with the party of the first part for himself, his personal representatives, heirs, and assigns to pay the said rent as hereinbefore reserved. And the said party of the first part further covenants and agrees with the said Henry H. Dodge, his heirs, representatives, and assigns, that at any time during the continuance of this lease or any renewal thereof, on the payment to it of ten dollars as a renewal fine, it will execute and deliver or cause to be executed and delivered to the said Dodge, his heirs, representatives, or assigns, at his or their request, a renewal of this lease on the terms herein provided for, for another term of fifty years, so that the same may be renewable and renewed from time to time forever.
88 This lease further witnesseth that the said Chesapeake and Ohio Canal Co. has constituted and appointed, and doth hereby constitute and appoint Josiah H. Gordon to be its attorney, for it, and in its name, and as its act and deed, to acknowledge this indenture before any person or persons having authority by law to take the said acknowledgment in order that the same may be duly recorded.

In testimony whereof the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by Josiah H. Gordon its president.

[CORPORATE SEAL.] J. H. GORDON,
President of the Chesapeake & Ohio Canal Company.
HENRY H. DODGE. [SEAL]

Test:
D. C. THOMPSON,
BENJ. FAWCETT,
Clerk & Treas.

89 *Exhibit R. & Bro. No. 9.*

OFFICE OF THE CHESAPEAKE & OHIO CANAL CO.,
Annapolis, Md., January 9, 1873.

Messrs. A. ROSS RAY & BRO.:

GENTLEMEN: Enclosed please find certified copy of a resolution passed by the board of directors of this company at their meeting on December 12, 1872.

to the same, be and the same are respectively hereby accepted, ratified, and confirmed.

I certify that the foregoing resolutions are true and correct copies from the journal of proceedings.

Attest:

[CORPORATE SEAL.] BENJ. FAWCETT,
Clk & Treas.

82 *Exhibit R. & Bro. No. 7.*

Chesapeake & Ohio Canal Co. to Henry H. Dodge.—Lease.—Recorded March 16, 1870—2.15 p.m.

* * * * * * *

The said party of the first part doth hereby lease and demise to the said Henry H. Dodge, his heirs, representatives, and assigns, all the land owned by said company situate and lying at and adjacent to Georgetown, D. C., aforesaid, between their canal and the Potomac River, bounded on the east by the western side of the northern abutment of the Alexandria Aqueduct, and on the west by the property formerly owned by Mason and known as the Founding, the said land having an extended front upon said river of about twelve hundred feet, with all their right, title, and estate therein, and secondly, all the land owned by said company between the canal and Potomac River above said
83 Georgetown, bounded on the east by the western line of Foundry property as agreed upon between Gen. John Mason and said company, and on the west by a line drawn across said property from the canal to the river at the distance of fifteen hundred feet west from the said western line of said Foundry property. To have and hold the said two above described premises, with the rights and appurtenances thereto belonging to the said Henry H. Dodge, his heirs, representatives and assigns, from the first day of March, 1870, for and during the full term of fifty years, yielding and paying therefor an annual rent of one hundred dollars payable on the first day of March in each and every year thereafter: Provided, That if the said company at any time during the continuance of the lease or any renewal thereof should wish and be prepared to build any outlet lock on the premises herein last described west of the
84 Foundry property, then so much of the same as may be necessary therefor shall be reserved and saved from the operation of this lease; provided further, that written notice be given of such intention to said Dodge, and that said outlet lock be commenced within three months from such notice and prosecuted thereafter with due diligence to completion; and provided further, that if said Dodge, his heirs, representatives, or assigns, shall at any time give written notice to said company that he or they intend and are prepared to put any improvements on said tract, that the said company shall then determine within three months whether or not it intended and was prepared to build said outlet lock as aforesaid, and in case of its declension and the execution of any improvements by the party of the second part, the said company not thereafter to have the said privilege.

85 It is further covenanted and agreed by and between the parties hereto that at the expiration of the said term of fifty years the said Dodge, his heirs, representatives, and assigns shall have the privilege of renewing the said lease for like periods and terms of years thereafter, from time to time forever, at the yearly rent of two hundred dollars per annum, and further, that if said lease should not be so renewed the said Dodge, his

heirs, representatives, and assigns shall be entitled to payment and compensation from said company for such improvements, or may be left by him or them upon said premises, according to such valuation of the same as may be mutually agreed upon, or in case of disagreement, as may be determined by referees, one to be chosen by said company, one by said Dodge, his heirs, representatives, or assigns, and a third by the referees so chosen. It it is further covenanted and agreed by the said
86 company that during the continuance of this lease or any renewal of the same they will keep and maintain their towing path on the northern side of said canal between the Foundry culverts, the point of crossing and the Alexandria Aqueduct, so as to allow to said Dodge, his heirs, representatives, and assigns the free and unobstructed use of the berme bank or former towing path and all the land hereby used. It is hereby further covenanted and agreed that if at any time there shall be a failure and refusal to pay the yearly rent reserved as aforesaid, and the same shall be in arrears for the period of six months, the said company in addition to their usual legal remedies for the recovery of said rent shall have the privilege, after a written demand for said rent and a refusal to pay the same, of declaring this lease forfeited and void,
87 and of re-entering upon said premises, as if said lease had expired. And the said Henry H. Dodge hereby covenants and agrees with the party of the first part for himself, his personal representatives, heirs, and assigns to pay the said rent as hereinbefore reserved. And the said party of the first part further covenants and agrees with the said Henry H. Dodge, his heirs, representatives, and assigns, that at any time during the continuance of this lease or any renewal thereof, on the payment to it of ten dollars as a renewal fine, it will execute and deliver or cause to be executed and delivered to the said Dodge, his heirs, representatives, or assigns, at his or their request, a renewal of this lease on the terms herein provided for, for another term of fifty years, so that the same may be renewable and renewed from time to time forever.
88 This lease further witnesseth that the said Chesapeake and Ohio Canal Co. has constituted and appointed, and doth hereby constitute and appoint Josiah H. Gordon to be its attorney, for it, and in its name, and as its act and deed, to acknowledge this indenture before any person or persons having authority by law to take the said acknowledgment in order that the same may be duly recorded.

In testimony whereof the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by Josiah H. Gordon its president.

[CORPORATE SEAL.] J. H. GORDON,
President of the Chesapeake & Ohio Canal Company.
HENRY H. DODGE. [SEAL]

Test:
D. C. THOMPSON,
BENJ. FAWCETT,
Clerk & Treas.

89 *Exhibit R. & Bro. No. 9.*

OFFICE OF THE CHESAPEAKE & OHIO CANAL CO.,
Annapolis, Md., January 9, 1873.

Messrs. A. ROSS RAY & BRO.:

GENTLEMEN: Enclosed please find certified copy of a resolution passed by the board of directors of this company at their meeting on December 12, 1872.

I have to request that you will be prepared to conform to the requirements of this resolution on or before 5th March next; whenever you are prepared I will direct the engineer of the company to superintend the erection of the guage required by your lease. A failure to comply with the said resolution before the opening of navigation will necessitate shutting off the water from your mill.

Respectfully,

A. P. GORMAN,
President.

90 *Summons to answer.—Issued Feb.* 26, 1873.

In the supreme court of the District of Columbia, February 26, 1873.

A. ROSS RAY ET AL., COMPLAINANTS,
vs.
THE CHESAPEAKE & OHIO CANAL CO., DEFENDANT. } No. 3090. Equity docket 12.

The President of the United States to the Chesapeake and Ohio Canal Company, defendant:

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness:

D. K. CARTTER,
Chief Justice.
R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Asst. Clerk.

MEMORANDUM.—That the defendant is to enter its appearance in this suit in the clerk's office on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

91 *Restraining order—Feb'y* 26, 1873.

A. ROSS RAY ET AL.
vs.
THE CHESAPEAKE & OHIO CANAL CO. } 3090. Equity docket 12.

An original bill praying that you be enjoined from shutting off the water from the mill of complainants under the resolution of your board of directors, dated Dec'r 12, 1872, or preventing the complainant from drawing water with their guage as their wheel as heretofore, is this day filed. Hearing is fixed for Thursday, the 6th March, 1873, at 11 o'clock a. m. Until further order you, your officers, and agents, are hereby restrained as prayed.

ANDREW WYLIE, *Justice.*

Marshal's return.

Summoned A. P. Gourman, and served copy of notice for injunction on A. P. Gourman, president, Mans, superintendent, & Patterson, engineer of the company, this 27th of February, 1873.

A. SHARP, *Marshal.*

92 *Answer of the C. & O. C. Co.—Filed April 3d, 1873.*

In the supreme court of the District of Columbia, April 3d, 1873.

A. ROSS RAY ET AL.
vs.
THE CHES. AND OHIO CANAL CO. } 3090. Equity docket 12.

The answer of the Chesapeake and Ohio Canal Company to the bill of complaint of A. Ross Ray and Albert Ray against them in chancery exhibited.

Respondents say:

1. They admit the averments of paragraph No. 1.

2. They admit the averments of paragraph No. 2, but refer to the lease itself, of which a copy is filed with the bill, for the conditions and restrictions on which the same is made.

3. They admit the alleged assignment by George Bomford to Alexander Ray, as far as it was competent for said Bomford to make such assignment.

4. They admit the averments of paragraph No. 4, except that they deny that any error was committed in the lease to Alexander Ray of one hundred inches, dated May 1, 1860. Said water was leased to be drawn from a different place and under different conditions from those of the lease to Bomford; was to be used in connection with the four hundred inches leased to Ray & Bro., all which required the consent of defendants and a new contract, in view of which the terms of said lease, or renewed lease, were mutually acquiesced in, and have been so acquies'ed in for over twelve years.

Defendants cannot admit that the purpose of said complainants, in regard to the enlargement of their mill and machinery, were communicated to defendants, and they deny that they agreed to supply the water necessary to drive said mill with its increased machinery, otherwise than by consenting to supply a flow through such aperture as complainant represented to be necessary and sufficient , made any other contract on the subject than such as is embraced in the written leases before referred to.

93 5. The defendants presume that the machinery and capacity of the mill of complainants were increased as averred, but they do not know and cannot admit that the details and costs thereof were communicated to the defendants, nor do they perceive the materiality of the averments in relation thereto, unless it be intended thereby to convey the idea that the defendants were in some manner committed by such alleged knowledge to a guaranty of a sufficient supply of water for said enlarged machinery; all which defendants wholly deny.

6. The defendants deny that the gauge and sliding-gate of the complainants were located as averred at the wheel of complainants' mill, with the knowledge and consent of these defendants, and deny that such location was made with the approval or by the direction of the officers of the company, if it is meant by the averment to that effect that such arrangement was intended as permanent, or as other than a temporary indulgence. The contract with said complainants requiring said gauge and sliding-gate to be at the canal bank, no officer of the company had a right to dispense with said requirements, or, as defendants aver, ever assured to do so; and if said gauge remained in said position at the wheel, it was never claimed to be there, as matter of right by complainants, but the right of the defendants to change it was

fully acquiesced in by them, as appears by their action hereinafter referred to.

7. The defendants deny the averments of paragraph No. 7, one and all; while it is true that the object of every water lessee is to procure adequate power to propel machinery, the stipulation of the defendants is limited, as will hereafter more fully be shown, to the supply of so much water as will flow through a given aperture into open space, at the canal bank.

94 Its sufficiency to propel the mill is not guaranteed by the defendants, but the lessee is left to utilize it as best he may, under certain conditions expressed in the leases. A strict performance of these conditions has not always been exacted when they could be released without detriment to the canal and its business. For a long time the trade on the canal was so limited that the millers could be safely indulged in the almost unrestrictive use of water, and they did use it ungauged and in other respects disregarded the requirements of their leases; and when gauges were put in, they have been allowed to place them temporarily near their mill-wheel, in expectation of deriving more power from the flow of water under those circumstances than with the gauge at canal bank. And it may be that this indulgence has been presumed upon, and the machinery of the mills or some of them has been adapted to the condition of things tolerated as aforesaid.

But if so, such action by the millers derives no countenance from their contracts, and defendants deny that it has been with their knowledge or consent. Defendants therefore insist that the insufficiency of the water leased to the plaintiffs, to propel their mills if gauged at the bank, if the fact be true, which they do not admit, is a fact wholly immaterial to the controversy.

And they wholly deny the alleged error in the dimension of the plaintiffs' gauge, for the reasons hereinbefore stated, as well as the allegation of error in ascertaining the proper bottom of the said Chesapeake and Ohio Canal.

8. They wholly deny the correctness of the construction put upon the lease and the resolution of 1865, by the bill of complaint, which limits the right of the defendants to remove the gauges from the wheel;

95 to the cases in which it may be necessary to prevent or lessen the inconvenience to the navigation of the canal or use of its towing-path, or necessary for the greater security of the canal and its works. The reservation of the right to alter the forebay and other works for said objects had no reference to the location of the gauge, but was contained in the original leases which assumed the location of the gauge to be at the canal bank. The location of said gauge at the wheels was made under a subsequent and entirely different arrangement, in which it was expressly stipulated that the gauges might be restored to the position contemplated by the leases during or at the pleasure of the defendants. The application of the millers to be allowed to draw water at their wheels and the written consent, in which the complainants united with the other millers to the terms and conditions of the resolution of February 23d, 1865, are a clear recognition of the plenary control of the defendants over the subject of the location of the gauges, and of the requirements of the leases on the subject, and an explicit waiver of all pretension of right to retain said gauges at the wheels, a pretension which has never been asserted before now, during nearly thirty years' existence of some of said water-leases.

Defendants, therefore, insist upon their right to require said gauges to be placed at canal bank at their pleasure. But in point of fact, they

show that their action in the premises has been neither arbitrary nor capricious, but founded upon good and sufficient reasons, and for objects provided for in the water leases themselves.

The lessees have paid little regard to the terms of their contracts.

The machinery of their mills has, in many instances, been altered and enlarged, demanding in consequence more power. The complainants are at this time, as defendants are informed, adding to their ma-
96 chinery. Whether the encroachments of the lessees were made necessary by this alteration or not, it is certain that they have used more water than they were entitled to. The gauges have been taken out without leave, or tampered with; the access to the gauges has been rendered difficult and disagreeable to the officers of the company, and deceptions have been practiced upon them so that it has been impossible for them to exercise proper supervision over the gauges, and will continue to be as long as they are not on the property of the canal company and open to observation. It is therefore deemed necessary to remove the gauges to the tow-path partly for the objects of restraining the lessees within the limits of their several grants. But it is also exacted by another important consideration. All the water leases in express terms recognize the primary object of the Chesapeake and Ohio Canal to be to afford navigation and the means of easy transportation of produce, and the paramount claims of trade over the manufacturing or milling interest, as well as the fact that at times there may not be found in said canal water sufficient for both navigation and propelling of machinery, and provide that in such case the defendants may limit or shut off entirely the supply of water belonging to the mills. The great increase of trade has sometimes made the exercise of this right necessary and will doubtless do so again—probably during the summer now approaching, and probably every year during dry seasons. But the defendants have encountered the same obstructions in the exercise of this right, that are before indicated. Millers have opened their gauges after they were closed by the company's officers; the same deceptions before averted to were practiced; and in at least one instance the miller absolutely refused to allow his water to be shut off. The consequence has been embarrassment to trade and difficulty in supplying transportation, all which can only be avoided by placing the water gauges
97 within the complete control of the proper officers of the company.

It will therefore be seen that one of the objects of the proposed change is to lessen the inconvenience to the navigation of the canal. In view of the evil aforesaid an engineer employed by the company as far back as May, 1872, made a report disapproving the location of the gauges, and a report of similar tenor was subsequently made by his successor in August, of the same year, whereupon said change was resolved upon by the board of directors of the company, not arbitrarily but as one required by the interest of trade and navigation, and not until after the close of navigation in 1872, so as not to incommode the millers unnecessarily. They further show that the spring trade is just about to open on the canal, and is expected to attain an unprecedented expansion; that the only vent for the large shipments of coal anticipated is at Georgetown, and its rapid discharge requires the unobstructed use of the Georgetown level of said canal, and that any restraint upon the control of the defendants over the water on said level for the purpose of navigation may prove disastrous to the great interest which is made by law, and recognized by the water leases, to be paramount in importance to the milling interest.

9. It is true that in 1870 the defendants complained of the excessive

use of water by the millers beyond the amount to which they were entitled, and that the gauge of the complainants, among others, was reduced in dimensions. The reason for said reduction, however, was that said gauge did not conform to the conditions of the water-lease of complainants—not having the aperture made plain and square through the iron plate as prescribed; and the complainants were nevertheless allowed by the engineer of the defendants to retain the same, with the
98 proper correction, which they were satisfied with and fully acquiesced in. And defendants deny that any allowance was withheld in said correction, to which said complainants were entitled.

10. Defendants deny that in and by the leases aforesaid it is agreed to furnish any particular quantity of water or water-power. Said quantity or power depends upon principally the depth of the water and the head or pressure above the point of discharge. But the defendants have never stipulated to keep up any head of water. Their charter only requires them to maintain a depth of four feet, and that with reference to navigation solely. It is true that the canal was constructed with a view to its ultimately having a depth of six feet, when the work should have acquired solidity as to bear it, and the increase of trade should require it; but when said canal was completed, it was not believed by the engineers employed in its construction that it would safely bear a greater depth than four feet at Georgetown, and it was not intended for some time to come thereafter to exceed that depth; and it is believed that when the system of leasing water was commenced, the maximum of increase in the depth had not been attained, nor has there at any time been a depth of six feet maintained as steadily as within the last few years. And at all times the head or depth has been subject to fluctuation from summer droughts, the lockage required by navigation and other causes, so as to make it impossible to maintain it uniform even through a single day. For these reasons the defendants industriously avoided guaranteeing any particular head or supply of water through the apertures agreed on, a further evidence of which is found in the fact that the location of the apertures is fixed with reference to a stationary plane—the canal bottom proper—instead of with reference to the varying surface. And if it can be held that the expectations of re-
99 sults based upon the condition and probable capacities of the canal can, in any sense, be incorporated into and made part of the several contracts with the millers, the utmost that can be claimed for them is that the defendants cannot withhold from them such indeterminate and variable quantity of water and power as could be derived through the apertures specified in their leases, under the varying conditions of said canal. But the defendants have not stipulated, nor has it ever been their practice to maintain an uniform supply of water or power, or to compensate deficiencies of supply at any time, by equivalents attained through changes in size or location of gauges, nor was any claim to such equivalents ever made before now by the lessees.

The rule has been the direct opposite; some of the water leases, with their renewals, have existed for over thirty years, and the others nearly twenty years; and in all cases the defendants have received and the lessees have paid an uniform rent without reference to the actual amount of water-power received, and without question as to the right of the defendants to the rent. They further show that equivalents in the sense claimed by the complainants are impossible, and that two gauges cannot be made to discharge an equal quantity of water placed at different distances from canal bottom under varying heads of water.

The defendants further show and admit that their obligation is to

deliver said water, under the varying conditions aforesaid, through the appertures agreed on, into open space, or to allow so much water to be drawn as will flow into open space, and defendants are prepared and able to supply said water, and deny that they have disabled themselves from so doing, either by subsequent contracts or by their neglect.

100 11. Defendants do not deem it necessary to answer in detail the averments in regard to the contracts with H. H. Dodge, esq.; suffice it to say that they were entered into after mature consideration and competent legal advice, and the leases to him were ratified by the stockholders, in general meeting, in which last respect his water-lease is the only one of the water leases that conforms to the charter; that the defendants do not guaranty the amount of water leased, and in point of fact only 525 inches, out of 1,050, which have been set off to said Dodge, or his assignees, have been appropriated to actual use, and that said quantity is only part of what was being unlawfully used by the millers in excess of the quantity to which they were entitled; and certain of the millers sought to legalize their use of the same by taking leases of it under the said Dodge. Defendants deny that said water was leased to said Dodge to be used without restriction, it being expressly leased subject to usual canal measurement; and defendants deny that their contracts with said Dodge in any degree affect their ability to comply with their contracts with the plaintiffs.

12. The only parties to whom the use of water has been allowed for propelling machinery, as alleged in paragraph No. 12, are Alexander Ray, father and landlord of the plaintiffs, and the Borden Mining Company; and, in conceding some privilege, defendants exacted from each of the said parties a stipulation that no more water should be used in discharging a boat than would be needed to lock it into the river Potomac; so that, if the conditions of said license were faithfully complied with, there would be no necessary consumption of water. Defendants do not deny that the privilege in question has been abused, as those given to the millers have been, but at the same time that the defendants have sought to restrain the millers, they have endeavored to remedy

101 this abuse by rescinding the permission to use the water in the manner complained of.

13. They wholly deny the neglect charged against them in paragraph No. 13; so far are the averments in this respect from being true, that at no time since 1866 were the mills so well supplied with water as during the past year, although the Potomac River was lower, by fourteen inches, than during any previous season since the year 1838. They were in fact better supplied than the mills in the adjacent country, all which was due to the care and large expenditures of the defendants. It is true that the usual ice freshets of the past winter have impaired the dam and feeder which supply the Georgetown level—an event which could not be foreseen or averted—but it has not yet been physically possible to repair this damage—and even in its damaged condition the dam in question supplies more water than was received when the leases were first made, being four feet higher than at that date.

But, further answering, the defendants deny that they are bound to keep up their canal at any standard of efficiency, for the purpose of supplying the mills, and claim that the millers are only entitled to be supplied from such surplus of water as may be incidental to the maintenance of said canal for purposes of navigation.

14. They admit the averments of paragraph No. 14.

15. They deny that the gauge of the complainants is rightfully at the wheel otherwise than by the license and indulgence of the defendants.

They wholly deny the combination and confederacy with H. H. Dodge, charged in said bill, as well as the persecutions therein alleged.

They do not admit the allegations of the bill in regard to the
102 effect of removing the gauge upon the working of complainants' mill, and they wholly deny that complainants would thereby be deprived of any water to which they are entitled under their lease.

16. Defendants can neither admit nor deny the averment in regard to the capacity of the mill of complainants, having no knowledge on the subject.

17. They admit that navigation is about to open on their canal, and that they have required of the water lessees a compliance with the terms of their leases.

Experience has shown that every indulgence to them in the way of relaxing the requirements of their leases has not only been abused, but has been misconstrued and perverted into binding concessions, whereby the defendants are involved in vexatious controversy, and justice to themselves and the other important interests dependent upon their management requires that the defendants shall exact a strict compliance with the terms and conditions of the leases.

And having answered said bill, as far as advised that an answer from them is material, the defendants pray to be hence dismissed with their reasonable costs, &c.

(Signed)

A. P. GORMAN.
President of the Chesapeake and Ohio Canal Co.

Attest:
BENJAMIN FAWCETT,
Clerk and Treasurer.

Filed, April 3d, 1873.

103 *Affidavit of Geo. T. Pope.—Filed April 3, 1873.*

DISTRICT OF COLUMBIA,
Washington County, to wit:

George T. Pope, being duly sworn, deposes and says that he is now, and has been for the past two years, assistant collector of the Chesapeake and Ohio Canal Company, at Georgetown, D. C.; that during the past summer, when there was not sufficient water in the canal for purposes of navigation and to supply the various mills, the *the* harbor master frequently directed the millers during such time of deficiency to suspend the use of water, and that frequently they refused, neglected, or declined to do so promptly, and at times after suspending operations they would commence the use of the water before they were permitted to do so.

GEORGE T. POPE.

Subscribed and sworn to before me this 14th day of March, 1873.
[SEAL.] JENKINS THOMAS,
Notary Public.

104 *Affidavit of W. E. Worthen.—Filed Apr. 3, 1873.*

Name, residence, profession, age?

William E. Worthen; New York City; hydraulic engineer; 54 years old.

Experience in hydraulics?

Since 1838 have been employed three-quarters of the time in works

connected with hydraulics for the supply of power to mills or for city supplies. Have been connected with many large manufacturing establishments in the measurements and distribution of water for power purposes, and with the construction of dams, canals, and mills for its application, as for the Locks & Canal Co., Lowell, Mass; the Cohoes Co., Cohoes, N. Y.; the Society of Useful Manufactures, Patterson, N. J.; Trenton Water Power Co.; Onsatonic Water Power Co., Birmingham, Conn., and many other smaller ones.

Acquaintance with leases for water power?

In my experience of the measurement of water used by mills,
105 have been employed both on the part of water companies and lease's often as referee; am acquainted with many of the forms of leases employed. The leases adopted by the Ohio & Chesapeake Canal are similar to the old leases in use at Patterson and Trenton, and formerly at Cohoes, with the exception in favor of the purposes of navigation.

What, in your opinion, is conveyed by the terms of the lease?

I understand that the company undertakes to convey to the lessee such a quantity of water as would pass through an aperture of a specified number of square inches in a certain position and subject to certain instructions and contingencies. By the terms "in an iron plate and not to exceed one-half inch in thickness," and the 3d clause that the "said aperture shall be plain and square through said plate, and that no device or contrivance," &c., I understand that the aperture should be in "mince pavois," as styled by French engineers, and that it
106 should discharge freely into the air with full construction at top, bottom, and sides.

By the 2d clause, "That the said aperture shall be so placed that its lower edge shall be not nearer to the canal bottom proper than two feet," I understand that the lessees are entitled to put the lower edge of the aperture at that level, and as no height is specified for the aperture, that the lessees may elect such height as would give them the most water with the specified area, practically, say two inches, and as specified in one of the leases. The lease's are therefore entitled to draw as much water as will pass through a rectangular opening in a thin plate two inches in height by length sufficient to give the specified area; that is, if the aperture specified be 100 square inches, the aperture must be 50x2 under a head equal to that of the surface of the water of the canal above the aperture, and that the discharge must be into free air with full contraction.

107 By the clause, "and whereas the primary object of the Chesapeake & Ohio Canal is to afford navigation and the means of easy transportation for produce and merchandise passing in the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches (with such depth of water as may be deemed expedient by the party of the first part to be maintained therein for the purpose of navigation), and also propel machinery, it is further mutually agreed between the said parties, that whenever, in the opinion of the officers charged with that duty by the said party of the first part, or the said officers may for the time in their or his opinion limit the quantity to be drawn from said canal according to the provisions of the contract at the point aforesaid, or altogether stop the same," it is evident that
108 no head of water above the aperture is guaranteed by the parties of the first part; no unvarying determinate quantity, but merely such quantity as can be spared from the purposes of navigation, vary-

ing from, say 6⅔ cubic feet per second under a full canal to nothing, dependent on the judgment of the officers of the party of the first part to say what may be spared "to propel machinery."

By the 4th and 5th clauses, I understand the location of the guage to be defined as inside the canal bank.

To sum up, I understand by the terms of the leases that the lessees are entitled to draw such quantities of water as would pass through a rectangular aperture of a specified number of square inches, placed at the canal bank inside the towing-path, under the varying heads that may be maintained in the canal, and subject to be cut off entirely
109 whenever the officers of the party of the first part deem the supply inadequate for the purposes of navigation and to propel machinery, the first use in all cases to be of primary importance. That the discharge must be with full contraction freely into the air; and as the lessees may place the lower edge of the aperture at the level of two feet above the bottom of the canal proper, it is to be presumed that they will do this uniformly, to secure as much head as possible; and for the same reason, that they will make the height as little as possible practically, say 2 inches, by the width necessary to secure the specified area of sq'r inches.

Can equivalent guages be established—that is, can other apertures be placed in other positions than that specified in the lease and discharge the same quantity of water?

To this question I say no. To discharge the quantities leased, the location of the guage must be so placed that it will be subject to all
110 the variations in the head or level of the canal to which it would be subject at the bank, and it must be the identical aperture to which the lessee is entitled at the canal bank.

Thus, suppose the aperture specified to be 100 square inches or 50″ × 2″ at the canal bank. Now, without varying the location of the guage, suppose that the lessee wished to draw from the bottom of the canal, and on the principle on which equivalent guages have been established by you, the aperture to discharge the same quantity of water that the 100 square inches would under a head 3′ 11″ (4 f't 1 in.) to the centre of the aperture, would be a V 3′ 11″ or V 3.92 ft. to V 5.92. 100 × V 3.92 = 80.7 sq. in. And then two apertures would discharge the same quantity of water, say 6⅔ cubic feet per second.

Now, let us suppose the level of the water in the canal to drop
111 two feet; then the discharges will be as the V 1.92 : V 3.92 and V 3.92, V 5.92, or the discharge through the first aperture will be 4.67 cubic feet, and through the second 5.4 cubic feet per second. Again, varying the aperture, if instead of 50″ × 2″ it be made 5″ × 20″, then the discharge under the conditions would vary as the square-root of the head over the centre of the aperture, or in full canal as V 3.92 : V 3.17 (4 ft. $\frac{20}{25}$ in.); if the first aperture be 6⅔ cubic feet per second, the second would be 6 cubic feet per second; and it will, therefore, be seen that if the lessees are entitled to a form of aperture under the varying head of the canal, neither the form nor the conditions of varying head can be changed, and that the location and form of guage must be maintained to give the lessees exactly what has been contracted for.

WM. E. WORTHEN.

Signed in presence of—
VINCENT CLARK,
Notary Public.

112 *Affidavit of T. L. Patterson.—Filed Apr. 3, 1873.*

Question 1. What is your profession, and how long have you been in the service of the Chesapeake & Ohio Canal Co.?

Answer. I am a civil engineer; was in the service of the Canal Co. about 14 years, from 1837 to 1858, and have been in their employ since last July (1872).

Qu. 2. What is the usual depth of the canal?

Ans. Six feet.

Qu. 3. What is meant by the term "canal bottom proper" in the water leases of the Ches. & Ohio Canal Co., and what is its position in the Georgetown level?

Ans. "Canal bottom" is a level plane extending from any lock to the lock next above it. This plane forms the base with reference to which the heights of all structures along it are calculated and described; as, for instance, in the specifications for aqueducts for 1837, "The top of the arch at the intrados shall be five feet below the bottom of canal."

113 In the section specification of 1841, "The width of the canal at water-line shall be 54 feet and at the bottom 30 feet, its depth shall be 6 feet with the addition below the bottom of one-tenth of a foot per mile for the distance of the section below the lock at the head of the level." This last will illustrate what is meant by the expression "canal bottom proper," used in the water leases, which are about contemporaneous with this specification, which was drawn up by Mr. Fisk, then chief engineer of the canal, as most likely was the form of the water leases.

So far as the Georgetown level is concerned, the contracts and specifications of sections from A to H, which include the work done on that level, all describe "the plan of the canal to be as follows, viz, the canal to be so constructed that the water-way may at all places be at least 60 feet wide at the surface, usually denominated the water-line, 45 feet at the bottom, and six feet deep."

114 In 1829 Jesse Leach, contractor for section C on this level, claimed additional compensation for increased width and depth of excavation beyond what his contract required. Mr. Benjamin Wright, then chief engineer, to whom the matter was referred, states in a letter to the directors of the canal, "For deepening the canal one foot. This is a claim which the engineer supposes must be incorrect, as according to his own recollection the depth of the canal was stated at the time the contract was let at six feet; and the engineer does not know of any variation from that depth, except where the width was necessarily diminished from eighty feet water surface." This deepening of the canal so as to maintain the enlarged water section was not considered as affecting the position of canal bottom; for Judge Wright, in a letter of instruction to Mr. Thomas F. Purcell, the resident engineer, in reference to Congress-street bridge, on this same level, directs that

115 the arch shall "spring from a level five feet six inches above bottom, or within six inches of water line"; these dimensions making up the depth of six feet between bottom of canal and water-surface.

In the lock specifications of all dates, where the height of the main walls is mentioned, it is set forth that "the main walls of the lock will rise to the height of one foot above the water-surface of the upper level." The level of water-surface at what is now considered by the harbor-master a full canal (say on a Sunday, when the mills are not running) is about fourteen inches below the top of the main wall of lock No. 4, at

the foot of the Georgetown level. From my experience of the practice on the canal I have no hesitation in saying that "canal bottom proper" of the Geo'town level means a level plane six feet below the level
116 fixed upon and described in the contracts for construction as the water line or surface.

Quest. 4. Why did you recommend that the guages be placed at the canal bank, and what advantage to the company would result from it?

Ans. I stated in my report on the subject that the guages ought never to have been removed from the canal bank, because there they are under the control of the company's officers and cannot be removed or tampered with by the lessees or their agents without detection. At the canal-bank the guages can be made exactly in accordance with the terms and provisions of the leases, so as to discharge exactly the quantity of water agreed to be leased, and are in a position where they can readily be inspected by daylight, where, at most, but five or six feet of flume entrance between the canal and the guage would require to be
117 guarded, instead of, as now, a long forebay shut out from view upon the premises of the lessees, from any part of which an undue supply of water might easily be abstracted without detection for months, if at all. Besides the fact that all, or nearly all, the guages now placed at the wheels are so placed under circumstances which constitute, in fact, the attachments and devices increasing the flow so expressly provided against in the leases, they are in nearly total darkness, and can only be examined by lamp-light and under attendant circumstances that render the duty extremely unpleasant to the officer who has to perform it.

Ques. 5. Will a guage of given dimension placed at the canal-bank, as prescribed by the terms and conditions of the usual form of the company's water leases, discharge into open space as much water as
118 the same guage would discharge *into open space as much water as the same guage would discharge* placed under like terms and conditions at the mill-wheel or elsewhere?

Ans. It will.

Ques. 6. Where, then, is the disadvantage to the lessees from placing the guages at the canal bank?

Ans. The disadvantage is not attributable to any diminution in the quantity of water, for of this they would get all that the terms of their leases entitle them to, but to a small loss of head.

Quest. 7. What was the depth of water above the canal bottom proper, on the Georgetown level, at the time when these water leases were granted?

Ans. I had no knowledge of the condition of the water in this part of the canal before 1852, having been engaged previous to that time upon the construction of the western end. From expressions in letters
119 and reports of Messrs. Cruger and Purcell, resident engineers, as late as 1832, it was not then deemed safe to allow more than four feet water on the Georgetown level. From my intimate acquaintance with Mr. Fisk, the chief engineer of the canal when the water leases were first made, and my knowledge of his extreme carefulness in preparing contracts and specifications, I am confident that the reference to a level not less than two feet from canal bottom proper, instead of to four feet below water surface, was made on account of the fluctuations in the height of water surface, and in order that the canal company should not be bound to maintain a specified depth of water above the bottom of the guage. In 1852 or '3, at which time I was gen'l sup't of the canal, there was trouble with the millers, who had, as represented

by Mr. Lambie, then superintendent of the Georgetown division,
120 enlarged their openings by boring through and cutting away the wooden bulkheads above their guages. It was contended by the millers in defence of this proceeding that the water was not kept at its full height; and I remember that one of them presented a professional opinion of Captain Sanger as to how much his opening ought to be enlarged to compensate for the diminished head. I think it probable, then, that up to that time there never had been the full depth of water on the Georgetown level, and that the original leases were made with a full knowledge that the company did not guaranty any particular head.

T. L. PATTERSON.

STATE OF MARYLAND,
Allegany County, to wit:

121 I hereby certify that on the twenty-second of March, eighteen hundred and seventy-three, personally appeared before me, a notary public in and for the city of Cumberland, county of Allegany, and State of Maryland, T. L. Patterson, and after being duly sworn, and the above interrogatories having been propounded to him, answered said interrogatories as herein above stated.

In testimony whereof I have hereunto set my hand and seal notarial the day and year aforewritten.

[SEAL.] G. L. WELLINGTON,
Notary Public

122 *Affidavit of W. R. Hutton.—Filed Apr. 3, 1873.*

What is your profession, experience, &c., and how long were you in the employ of the Chesapeake & Ohio Canal Company?

I am by profession a civil engineer of more than 20 years' experience. During a large part of the time I have been engaged on works of hydraulic engineering. I was in the employ of the canal company as its engineer from July, 1869, to January, 1872.

Has the water surface of the canal ever been maintained at a higher level than at present, and is the company able to furnish as much water now as at any time past?

Apart from the fluctuations now caused by the increasing demands of trade, the water surface of the canal has never been maintained at a higher level than it is at present. It is said to have been at times much
123 lower, but of this I have no personal knowledge. The company is able, in my opinion, to furnish as much water to millers now as at any time past, for although the trade of the canal has greatly increased, the work is kept in better repair, and a better supply of water is now maintained than ever before.

What is the proper depth of the canal, and by what means did you ascertain the proper height at which to place the guages?

The canal has been treated as six feet deep since my first connection with it, and in my opinion was understood to be six feet deep at the time the earliest water-leases were made, and ever since. I think the Georgetown level above Georgetown was originally constructed seven feet deep. I ascertained the proper height of canal bottom for the purpose of placing the water guages, by measurements from the coping and
124 mitre sill of lock No. 4, and tested the result by comparison with the bottom of the Potomac aqueduct of the Alexandria Canal,

which being a structure of masonry, was built with great accuracy to the proper heights.

What do you know of the excessive use of water by the millers?

In the spring of 1870 I ascertained by actual inspection and by the admission of the millers that four mills, most of them of the largest class, were running without any guages, and the remainder (with one exception) had guages which were not in conformity with the provisions of their leases, and which would abstract from the canal from 7 to 10 per cent. more water than their proper guages. Several of them were also furnished with other openings called "starting spouts," through which water could be drawn. Exclusive of these starting spouts, I estimate the quantity of water that could thus be drawn from the
125 canal in excess of *of* that leased to be equal to 725 square inches canal measurement.

While engineer of the canals, did you give to George Shoemaker permission to remove his guage, and under what circumstances?

In the latter part of October, 1871, I gave permission to George Shoemaker to remove his guage, in order to enable me to make certain observations upon his water-wheel, which were requested by him and by the manufacturer of the wheel. This request was accompanied by a promise from him that the guage would be replaced the moment I directed or asked that it be done after my examinations were completed. Mr. Shoemaker asked permission to leave the guage out permanently, which was refused by me as being beyond my powers. I also refused permission to leave it out until the next meeting of the
126 board of directors of the canal, but did consent that the permanent replacing and rivetting of it might be suspended a few days until he could communicate with the president of the canal company. On the 24th November he wrote to the president; the letter was referred to me, endorsed and returned to the president by me on the 2d December, 1871. Some weeks afterwards, I observed that the guage was loose or out, and directed Mr. Shoemaker or his head miller (who has also an interest in the mill) to replace it. I resigned my place on the canal in January, 1872, and have no further knowledge on the matter, except that about the month of February or March, 1872, I observed in passing that the guage had not been replaced.

Will a guage as prescribed by the terms and conditions of the
127 usual leases, placed at the canal bank, discharge as much water as the same guage would discharge under like conditions if placed at the wheel or elsewhere?

It will.

Why then does the miller obtain more power when the guage is placed at the wheel?

This is only true as a general fact where the overshot-wheel is used, and for this reason: the overshot wheel requires that the water should enter the buckets with a certain velocity, to be obtained only by a corresponding head above the opening of the gate. If the guage is placed at the wheel the velocity with which the water flows through it is sufficient—the water in the forebay being level with that in the canal. If the guage is placed at the canal bank, this velocity cannot be made available. The water must be received in a forebay at a lower level, with its surface nearly or quite as low as the opening of the
128 guage, and thus conveyed to the wheel; the gate at the wheel must then be placed at a certain distance below the surface in the forebay, which is already lower than the surface of the canal. This involves a lower water-wheel and corresponding loss of power.

Where turbine wheels are used, as a general principle, there will be no loss of power. In particular cases the reconstruction of the forebays or water-channels will be necessary.

WM. R. HUTTON.

Sworn to before me this the 27th day of March, 1873, and subscribed in my presence.

G. E. SANGSTON,
Notary Public.

129 *Affidavit of A. P. Gorman.—Filed Ap'l 3, 1873.*

Before the subscriber, a justice of the peace of the District of Columbia in and for the county of Washington, on this third day of April, A. D. 1873, personally appeared A. P. Gorman, who on his solemn oath deposes and says that he is the president of the Chesapeake and Ohio Canal Co., and has been so from the 17th day of June, 1872. That during the months of July, August, and September, 1872, the officers of the company at Georgetown frequently called his attention to the interference with the navigation of the canal by the lessees of water refusing to suspend its use when required to do so. That on several occasions he was compelled to visit Georgetown, and was finally compelled to direct the superintendent of the canal to shut off the water from every mill so refusing. That the board of directors then appointed an inspector of guages, who was charged with the duty of frequently inspecting the various guages and prevent more water being
130 drawn than they were entitled to, or any interference with the navigation; but that owing to their present location at or near the wheels it was found impossible to do so at all times, nor could he devise any means by which to prevent their being tampered with, and more water being drawn than they were entitled to under their respective leases. That in at least one case no guage whatever was used, and the flow of water was only limited by the capacity of the wheel. That he then sought an interview with some of the lessees of water, and informed them that the canal company was then and had made extensive repairs to the dam and feeder at the Little Falls. That notwithstanding the water in the Potomac River was lower than for many years, the supply of water to the mills, as he was informed and believes, was
131 more regular and they were subject to less delays than for many years. That the repairs to the feeder and dam, in fact, enured more to the benefit of the millers than to the navigation and trade. That they recognized it as such, and offered to pay for a portion of the work, but that the company declined to accept their contribution. That after the completion of these repairs, and owing to the extraordinary drouth, there were times when there was not sufficient water for purpose of trade and supply of mills. That the officers of the company were frequently interfered with, and in one case the millers absolutely refused to suspend the use of water when required to do so. That the reports of the engineers of the company, as well as his own observation, has convinced him that to limit the supply of water to each lessee
132 to the quantity they are entitled to, and to prevent any interference with navigation of the canal, can only be done by placing the guages at the canal bank, where they can be inspected. That the company has ordered a steam dredging machine, and contemplate making other improvements for the accommodation of its large and increasing trade, but that any interference on the part of the millers, by using

more water than they are entitled to, or refusing to suspend its use when required to do so, must seriously embar'ass its trade.

A. P. GORMAN.

Sworn and subscribed before me this 3d day of April, A. D. 1873.

SAM'L C. MILLS, *J. P.*

133 *Affidavit of J. H. Kindle.—Filed Ap'l 3, 1873.*

DISTRICT OF COLUMBIA,
Washington County, to wit:

J. H. Kindle, being duly sworn, deposes and says that he was appointed harbor-master of the Chespeake & Ohio Canal Co., at Georgetown, D. C., on the 1st day of August, 1872. That it was made his duty to require the lessees of water to suspend the use of it when there was not sufficient for purposes of navigation and to supply the various mills. That some of the millers refused or neglected to suspend promptly when required to do so. That all or nearly all of them would object to doing so. That the miller in charge of George Shoemaker' mill did upon one occasion positively decline to suspend, and that he was compelled to call the president's attention to that case. That the refusal or neglect on the part of the millers did interfere with the navigation of the canal.

J. H. KINDLE.

Subscribed & sworn to before me this 14th day of March, 1873.

JENKIN THOMAS,
Notary Public.

134 *Affidavit of Manning.—Filed April 3, 1873.*

Affidavit of Charles P. Manning.

Answer to interrogatory 1st. My name is Charles P. Manning; my age is fifty-six years, of which thirty-five years have been devoted to the pursuit of civil engineering upon public improvements, such as railways, canals, and water-works.

Answer to interrogatory 2d. I was in the service of the Chesapeake and Ohio Canal Company as engineer and general superintendent from the 1st of January to the 1st of October, 1866, and during that time had occasion to investigate the subject of gauging the supplies of water for milling and other mechanical uses, then being drawn from the canal chiefly in the city of Georgetown.

Answer to int. 3d. The results of my investigations led me to
135 advise strict adherence to the specifications to the original and usual form of water-lease adopted by the canal company, and a speedy restoration of the canal bank of all gauges that had been removed therefrom.

Answer to int. 4th. My advice was based upon the conviction that any departure from the terms and conditions of the form of the usual water-power leases was detrimental to the true interests of the canal company; and especially that the removal of the gauges from the premises of the company seriously impeded, if it did not virtually prohibit, that constant inspection and control of them which the terms of the lease clearly contemplated, and the obligations of the company's service demanded.

136 Answer to int. 5th. A gauge of given dimensions placed at the margin of the canal bank (on either side thereof), according to the usual form of the company's water-leases, would vent into open space,

as much water as the same gauge could possibly discharge, under like terms and conditions, if placed at the mill-wheels or elsewhere away from the margin of the canal.

Answer to int. 6th. The standard depth of water in the Chesapeake and Ohio Canal, when filled, was, and is, six feet (6 f't), measuring from "canal bottom proper," which latter is (as a rule) seven feet (7 f't) below the top of the lower lock of each "level."

CHAS. P. MANNING.

Test:

W. L. HAYWARD, J. P.

March 28th, 1873.

137 BALTIMORE CITY, *ss:*

On the 28th day of March, eighteen hundred and seventy-three, before the subscriber, a justice of the peace in and for said city, personally appears Charles P. Manning, and makes oath on the Holy Evangely of Almighty God that the annexed statement, as stated, is just and true, and that to the best of his knowledge and belief.

Sworn before—

W. H. HAYWARD.

Affidavit of Maus.—Filed April 3, 1873.

Affidavit of Isaac R. Maus.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

ISAAC R. MAUS, being duly sworn, deposes and says that he is now and has been since December, 1866, superintendent of the Georgetown division of the Chesapeake and Ohio Canal; that as such
138 superintendent he has had charge of the repairs of said division and the dam at the Little Falls; that in the winter of 1871 and '72 extensive repairs were made at the feeder of said dam, and that by the direction of the president additional expenditures were made on feeder during the past summer; that the water in the Potomac River during a portion of the past year was lower than it had been since 1866. I am positive as to this, as there is a large stone in the pool of the dam, which has been used as a mark, and it was from twelve to fourteen inches further out of the water than it has been to his knowledge since 1866; that notwithstanding this that he is confident the supply
139 of water to the various mills on the Georgetown level was more regular than it had been in any year since his connection with the canal in 1866; that during the months of July, August, September, and first 10 days of October, 1872, occasionally there was not sufficient water for purposes of navigation and to supply the various mills; that the harbor-master called his attention to fact that a number of the millers refused to suspend the use of the water when required to do so, and that he was compelled require them to suspend; that the farther refusal or neglect of the of water to suspend operations promptly when required has caused serious delays and difficulties in the navigation of the canal. In one case, that of George Shoemaker,
140 he was compelled to request the action of the president of the company, and that the president directed him to shut off the water from said mill in case of a second refusal; that his long experience as superintendent of the canal has demonstrated the necessity for some

means to be provided by which the officers of the company can diminish or entirely suspend the supply of water to the mills when purposes of navigation require it; that he has heard at least one of the millers admit and state to the president of the company that he had refused to suspend operations when required to do so; that he has been directed further to inspect the guages, but found that their location made it a difficult matter to do so, at any time, and in most cases it cannot
141 be done while the mills in operation; some of the millers have no gauges whatever.

R. J. MAUS, *Sup't.*

Sworn and subscribed before me this 14th day of March, A. D. 1873.
CHARLES WALTER, *J. P.*

Restraining order continued.—June 13, 1873.

In the supreme court of the Dist. of Col'a.

A. Ross Ray & Bro.
v.
Ches. & Ohio Canal Co. } 3090. Equity.

By consent of parties, it is, this 13th day of June, 1873, ordered that the restraining order heretofore passed in the above entitled cause operate as a special injunction, and continue until the final hearing of this cause.

By the court.

A. WYLIE,
Justice.

142 In the supreme court of the District of Columbia. In equity.

George Shoemaker
v.
The Chesapeake & Ohio Canal Co. and Henry H. Dodge. } No. 3102.

The several answer of Henry H. Dodge to the bill of complaint in the above case.

1 & 2. He admits the allegations in paragraphs 1 and 2 thereof.

3. He also admits the primary object of the charter of said company, as stated in paragraph three; but he denies the residue thereof. On the contrary, he alleges the facts to be that the supposed limitation referred to therein is that contained in the sixteenth section of the original charter of the C. & O. Canal Company, and relates exclusively to the sale of "waste water" on the canal "wherever wastes shall be essential to the security of the canal, and in no other situation whatever, along the same;" "providing that in such case the waste water
143 of the said canal may be from time to time sold or disposed of by the said company for the purpose of supplying such works and machinery as require a water power," and that, under such section, none of the existing leases of water on the Georgetown level of the said canal were made or could be made, inasmuch as none of them are leases of water flowing at waste-weirs, as contemplated in and by said section.

He further says that the full power to dispose of surplus water, without any limitation as to persons, plans, or specific uses, was conferred

by a subsequent amendment of said charter, passed by the State of Virginia Feb. 27, 1829, which was assented to by Maryland March 22, 1833, and was finally approved by Congress March 3d, 1837, and is as follows, viz:

"Be it further enacted, That the said president and directors, acting in behalf of the said company, and with the consent and approbation thereof, expressed at some general meeting thereof, in which a majority in interest of said stock is represented, may sell, let, or
144 otherwise dispose of any surplus water in any part of the said canal, or of any feeder or reservoir thereof, if they shall be of opinion that no injury will result therefrom to the navigation of the canal."

He further says that no sales, leases, or other disposition of surplus water of any kind were made, or attempted to be made, by the said canal company until after the passage of the said amendment and its approval by Congress.

But supposing the fact to be, as alleged by the plaintiff, that all sales of water or surplus of water must be made by the canal company for the purpose of supplying such works and machinery as require water-power, this defendant avers that the lease to him from the canal company was, in point of fact, made by the said company for such purposes, and that the water granted by it, so far as it has been used hitherto, has been used for such purposes, and none other, and that his lease
145 was fully authorized by the charter of said company.

He further says that his said lease of water was granted to him by the said company in connection with his leases of land of said company, which land lies on the bank of the Potomac River above the acqueduct bridge at Georgetown; that the water so leased was originally intended to be used by him as a motive power for transferring coal from the canal to steamers and other vessels in the said river, at coal docks to be constructed by him on said land—a purpose beneficial to said company; that shortly after the date of said lease the use of the water granted thereby was solicited from this defendant by the said plaintiff and other millers of Georgetown, who then admitted that they had not water enough under their leases to run their respective mills; that this defendant then refused them the use of his said water, on the ground that he needed it himself for his own use, in connection with his
146 coal docks; that afterwards, having been disappointed in his plans in reference to said coal docks, he was again solicited by them for the use of his said water, to be used by them in connection with their mills, and to supply their admitted deficiency of water; that under these circumstances he then consented to the temporary use thereof by said millers, under permits granted by him, under his said lease, to each of said millers; that under a permit to the said plaintiff the said canal company set off to the said plaintiff two hundred (200) inches of the surplus water granted to this defendant by his lease of surplus water, at the request of the said plaintiff; and, further, that upon the joint request of said plaintiff and the other millers, before referred to, the canal company set off to this defendant eight hundred & fifty (850) inches more of surplus water under his said lease (in addition to the 200 inches previously set off to the plaintiff, and of
147 which they *they* all had knowledge), and that he and they used the said 1,050 inches of surplus water under his said lease and the said temporary permits for the use thereof for several months during the spring, summer, and fall of the year 1870, without objection to said lease or denial on their part of the authority under which it was made, or of

the extent of the surplus beyond their existing grants, during the pendency of resolutions on their parts for the purchase of such parts of the said admitted surplus as they severally needed (copies of which joint request and of the permit to the said plaintiff, in all respects similar, except amounts of money & water, to the like permits, and marked Exhibits No. 1 & 2); and the defendant further says that at the time and at all times prior to the filing of the plaintiff's bill, the said plaintiff has admitted the validity of the said lease of this defendant and the
148 existence of a surplus of water under it, at least to the extent of the said 1,050 inches of surplus water set off to him and them at their request, as before stated.

And this defendant further shows that his said lease from the said canal company contains the following provision: "And the said party of the first part [the C. & O. C. Co.] further covenants and agrees with the said party of the second part, his heirs, representatives, and assigns, that the said company for the common benefit shall and will in all present and all future leases or privileges for the use of waste or surplus water or water-power, made or to be made by it on said level [Georgetown level], cause the quantity of water so sold or used to be accurately measured through fixed guages, &c."; and that the said canal company, under the said covenant, is bound accurately to measure through fixed guages all quantities of water sold or leased by it under all leases or privileges for the use of surplus water made prior to its lease to
149 this defendant in the manner and at the places prescribed by the terms of the said prior leases or privileges, and among others the prior lease under which the said plaintiff holds, viz, at the canal bank, and not elsewhere.

And this defendant, on information and belief, further says, and charges the fact so to be, that the present suit of the said plaintiff against the defendants herein is in pursuance of, and is a part of a combination between the said plaintiff and the other millers who have bro't suits against the canal company to prevent the said company from requiring them severally to place their guages at the canal bank, as is required by their respective leases, and thus to be enabled, either without guages or with guages placed elsewhere than is required by their respective leases, to draw an excessive quantity of water from the canal under their said leases, and thereby to destroy or greatly to impair the value of this defendant's lease by reducing the surplus quantity
150 to which he is justly entitled under his said lease, and thereby preventing the canal company from furnishing the same.

4. For answer to the 4th paragraph of said bill this defendant refers to the answer of his codefendant, the canal company, in reference thereto, and he adopts the same as his answer.

5. This defendant admits that his codefendant, the canal company, made a lease to him of surplus water, dated Feb. 17th, 1870. He says further that he has no knowledge of the plaintiff's application to the canal company in 1865 for an additional supply of water to run his mill other than the plaintiff's statements since that time and since the grant of the defendant's lease. He does not know what representations the said plaintiff made to the canal company at the time of his application therefor; nor does he know whether at the time of the said appli-
151 cation the said plaintiff informed the canal company that he was then actually using the surplus quantity of water for which he applied. If he had, the action of the company would probably have been favorable. This defendant further says that it does not appear, nor does the plaintiff allege, that he followed up his said application from year to

year, in the meantime, during the five years from 1865 to Feb. 17th, 1870, the date of this defendant's lease, it being a well-known fact that the board of directors of the said canal company was changing in its membership from year to year, and that this change required a renewal of his application from time to time. This def't denies that the laches of the said plaintiff in this respect furnishes any reason to invalidate the lease obtained by this defendant five years after the said plaintiff's application. He also denies that the said plaintiff was "compelled" to buy surplus water from this def't by reason of any combination between
152 him and the said canal company, or that any such combination ever existed against him or against others in like condition, or that he was "compelled" from any other cause than the fact that this defendant by his superior diligence had obtained from the said canal company a grant of the surplus water beyond the "existing quantity," a portion of which water the said plaintiff needed for his mill as then constructed. This defendant admits that the said plaintiff applied to him for the purchase of the 200 inches of water referred to, on or about March 9th, 1870, as before stated in paragraph 3; but he avers that at the time the said plaintiff did not represent to him that he (the said plaintiff) then intended, or at any time previously had intended to alter or enlarge his mill, and wanted additional water for that purpose. On the contrary he admitted that he was then actually using two hundred inches of water more than he was legally entitled to use under his lease
153 from the canal company, and therefore needed that additional amount from this def't in order to run his mill as then constructed. He also says that after the said plaintiff obtained the use of, and subsequently purchased, the said two hundred inches of water from this defendant, and after the said plaintiff's guage had been put in by the canal company at or near his wheel, including the said two hundred inches, the said plaintiff continued to use and run his mill as before without complaint; that he expressed himself repeatedly to this defendant & others as having all the water which he then needed to run his mill, as it was then constructed; that it was not until more than a year after pl'ff began using the deft's surplus that the defendant learnt that the said plaintiff intended to alter the construction of his mill, or that he actually changed the wheel and enlarged the machinery of his said mill; that it
154 was not until about Nov. 10th, 1871, that this defendant heard any complaints from the plaintiff, on the ground that he had not water enough to run the altered machinery of his mill with the gauge placed as it was before the said changes; that previous to said changes the said pl'ff did not desire to alter or to remove his gauge from the place where it then was; and that the necessity therefor arose from the enlargement and entire change of the machinery of the said plaintiff's mill, and from the inadequency of the same quantity of water to propel it which had been sufficient before said changes.

This defendant admits the sale by him to pl'ff of 200 inches of surplus water for the sum of $13,333.33⅓; but he says that payment has been made to him as follows, and not otherwise, viz, that $1,000 in cash
155 at the time of the sale and assignment, that $1,333.30 was paid in a 60 day note, afterward paid at maturity, and that the balance of the purchase money was paid in 10 notes, running from one to ten years, for $1,100 each, were secured by a mortgage on the plaintiff's mill, which was marked 'mong the land records of the District of Columbia, at or about the time of the said sale, as by reference to the said records will more fully appear. That no attempt (as is intimated by the plaintiff) was made by this defendant to conceal the true consideration

for the assignment of the said 200 inches of water, but that the $1,000, the cash payment, was used for convenience as being a sufficient consideration to give legal validity to the transfer, while the public record of the mortgage showed the balance of the consideration.

156 6. He denies, as before, that the enlargement and change of the plaintiff's mill as contemplated by him at the time of the assignment of the said 200 inches of water from this defendant to plaintiff, or that the said additional quantity of water was purchased by him with a view to said enlargement or alteration, and says that it was obtained in order to run the mill as it was before the said changes; that it was fully adequate for that purpose, and that said changes were not made till more than a year afterwards, so as before stated in the preceding paragraph, to which reference is here made. He also denies, on information and belief, each and every other allegation of the 6th paragraph, with the single exception of the statement in the concluding sentence, which

157 admits that the plaintiff's gauge (which had been temporarily removed by the plaintiff, with the permission of the engineer of the canal company) has not been replaced. In regard to the removal of said gauge, this defendant, on information and belief, further says that the permission to remove it was merely for a temporary purpose, to enable the said plaintiff to make an experiment, and that within a week or ten days after the said permission was granted the said plaintiff was called upon by the engineer of the canal company, and repeatedly so afterwards, and requested to replace his gauge as before. That the said plaintiff has repeatedly promised to do so, but that hitherto he has never done so, as he himself admits.

7. This defendant denies each and every allegation of this para-

158 graph, both in point of fact and of law; and, on the contrary, he insists that by the terms of the pl'ff's lease, and the legal effect of his assignment of the 200 additional inches of water under this defendant's lease, the said pl'ff is only entitled to such quantity of water as will pass through 325 square inches of guage or aperture, placed at the canal bank in accordance with the terms of said leases, and not otherwise, and accordingly he now resists the insidious attempt made by the plaintiff to except himself from the obligations imposed on him by his lease and assessments, to have the water to which he is entitled guaged at all; or if gauged, to have it gauged at some other place, and by and through some other contrivance or aperture than through a fixed guage of the required kind and dimensions placed at the canal bank as prescribed and required by the terms and conditions of the said lease and assessment, and he therefore insists that no wheel, turbine or overshot, or other device, shall be substituted and used by the plaintiff as *as* a gauge, whether with or without the consent of the said canal company.

159 8. This defendant again admits that the lease of water dated Feb. 17, 1870, was executed and delivered to him by the said canal company. He refers thereto for its terms and legal meaning, and to the amendment to the charter of the canal company under which it was granted, before referred to in paragraph 3, for the authority to make it, without the limitations and restrictions alleged to be necessary by the plaintiff's bill in the 3d & 8th paragraphs thereof. But he also admits that by the terms of his said lease (like all the other water-leases granted by the said canal company) the water granted thereby is to be measured by the usual "canal measurement," and therefore he denies that as to the said two hundred inches of water acquired by the said plaintiff from this defendant, the said canal company has no power or authority

to interfere with and control the same, as is alleged by the said plaintiff.

160 He also denies that Hutton, the engineer of the canal company, ordered the gauge of the plaintiff to be removed, or that he did more than grant a temporary license to the plaintiff to remove the same, for the alleged purpose, for the time, and under the circumstances before stated in paragraph No. 6.

He admits the resolution of the canal company referred to by pl'ff on information and belief only. He also says that the canal company being bound by its covenant (as heretofore shown in paragraph 3 of this answer), or to cause the quantity of water sold or used under all grants, present or future, to be accurately measured through fixed gauges, could not legally grant the privilege asked by the plaintiff without the consent of this defendant, who also utterly denies that he ever gave his assent to the granting of said privilege, but, on the contrary, absolutely refused to do so.

9. This defendant knows not, and cares not, whether the conse-

161 quences alleged by plaintiff could or would not follow, from placing the plaintiff's guage at the canal bank, as is required by the usual form of the canal company's leases, by the plaintiff's lease and assignment, and by the canal company's notice to the plaintiff; but if they should, he says that they will result from the inadequacy of the quantity of water to which the said plaintiff is legally and justly entitled under his lease and assignment to draw the new and increased quantity of machinery placed by him in his new mill, to wit, since the date of his lease and the date of the grant to def't, as before stated in paragraph No. 5; and that the will not result from the mere fact of placing the plaintiff's gauge at the canal bank under the conditions prescribed by the contracts under which he holds; that any such possible injury will be, "damnum absque injuria," and cannot be used to prevent the defendants, severally, from exercising and insisting upon their legal

162 rights under their respective contracts, against the groundless claims & pretentions of the plaintiff.

10. This defendant, on information and belief, adopts as his own the answer of his codefendant, the canal company, to this paragraph of the plaintiff's bill; and for further answer to the same he refers to his foregoing answer to paragraph No. 9.

11. He also adopts, on information and belief, the answer of his codefendant, the canal company, to this paragraph, with the following additions thereto: He denies that the said canal company has no interest in any surplus water existing in 1870, but (because it) has disposed of the same to Henry H. Dodge; on the contrary, he says that the said company is interested in having the water furnished under the grants prior to that of this defendant accurately gauged, as before shown, and in having such surplus to furnish to the said Dodge under his said lease, and in obtaining under it the stipulated rent therefor, which otherwise

163 would not be reserved by the said company. He also denies that there is any provision in his existing lease requiring him "to repair or reconstruct the feeder of said live (level?) at dam No. 1," &c., as by reference to said lease will fully appear. He also distinctly and unequivocally denies the further allegations of plaintiff, that in point of fact the said resolution was passed, not to remove obstructions to the navigation of the canal, but that the same was passed at the pressing instance of the defendant Dodge, and to increase the value of his grant from said company as hereinbefore set out. On the contrary, this defendant says, and he will be able to show by abundant evidence here-

for the assignment of the said 200 inches of water, but that the $1,000, the cash payment, was used for convenience as being a sufficient consideration to give legal validity to the transfer, while the public record of the mortgage showed the balance of the consideration.

156 6. He denies, as before, that the enlargement and change of the plaintiff's mill as contemplated by him at the time of the assignment of the said 200 inches of water from this defendant to plaintiff, or that the said additional quantity of water was purchased by him with a view to said enlargement or alteration, and says that it was obtained in order to run the mill as it was before the said changes; that it was fully adequate for that purpose, and that said changes were not made till more than a year afterwards, so as before stated in the preceding paragraph, to which reference is here made. He also denies, on information and belief, each and every other allegation of the 6th paragraph, with the single exception of the statement in the concluding sentence, which

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7. This defendant denies each and every allegation of this para-

158 graph, both in point of fact and of law; and, on the contrary, he insists that by the terms of the pl'ff's lease, and the legal effect of his assignment of the 200 additional inches of water under this defendant's lease, the said pl'ff is only entitled to such quantity of water as will pass through 325 square inches of guage or aperture, placed at the canal bank in accordance with the terms of said leases, and not otherwise, and accordingly he now resists the insidious attempt made by the plaintiff to except himself from the obligations imposed on him by his lease and assessments, to have the water to which he is entitled guaged at all; or if gauged, to have it gauged at some other place, and by and through some other contrivance or aperture than through a fixed guage of the required kind and dimensions placed at the canal bank as prescribed and required by the terms and conditions of the said lease and assessment, and he therefore insists that no wheel, turbine or overshot, or other device, shall be substituted and used by the plaintiff as *as* a gauge, whether with or without the consent of the said canal company.

159 8. This defendant again admits that the lease of water dated Feb. 17, 1870, was executed and delivered to him by the said canal company. He refers thereto for its terms and legal meaning, and to the amendment to the charter of the canal company under which it was granted, before referred to in paragraph 3, for the authority to make it, without the limitations and restrictions alleged to be necessary by the plaintiff's bill in the 3d & 8th paragraphs thereof. But he also admits that by the terms of his said lease (like all the other water-leases granted by the said canal company) the water granted thereby is to be measured by the usual "canal measurement," and therefore he denies that as to the said two hundred inches of water acquired by the said plaintiff from this defendant, the said canal company has no power or authority

to interfere with and control the same, as is alleged by the said plaintiff.

160 He also denies that Hutton, the engineer of the canal company, ordered the gauge of the plaintiff to be removed, or that he did more than grant a temporary license to the plaintiff to remove the same, for the alleged purpose, for the time, and under the circumstances before stated in paragraph No. 6.

He admits the resolution of the canal company referred to by pl'ff on information and belief only. He also says that the canal company being bound by its covenant (as heretofore shown in paragraph 3 of this answer), or to cause the quantity of water sold or used under all grants, present or future, to be accurately measured through fixed gauges, could not legally grant the privilege asked by the plaintiff without the consent of this defendant, who also utterly denies that he ever gave his assent to the granting of said privilege, but, on the contrary, absolutely refused to do so.

9. This defendant knows not, and cares not, whether the conse-
161 quences alleged by plaintiff could or would not follow, from placing the plaintiff's guage at the canal bank, as is required by the usual form of the canal company's leases, by the plaintiff's lease and assignment, and by the canal company's notice to the plaintiff; but if they should, he says that they will result from the inadequacy of the quantity of water to which the said plaintiff is legally and justly entitled under his lease and assignment to draw the new and increased quantity of machinery placed by him in his new mill, to wit, since the date of his lease and the date of the grant to def't, as before stated in paragraph No. 5; and that the will not result from the mere fact of placing the plaintiff's gauge at the canal bank under the conditions prescribed by the contracts under which he holds; that any such possible injury will be, "damnum absque injuria," and cannot be used to prevent the defendants, severally, from exercising and insisting upon their legal
162 rights under their respective contracts, against the groundless claims & pretentions of the plaintiff.

10. This defendant, on information and belief, adopts as his own the answer of his codefendant, the canal company, to this paragraph of the plaintiff's bill; and for further answer to the same he refers to his foregoing answer to paragraph No. 9.

11. He also adopts, on information and belief, the answer of his codefendant, the canal company, to this paragraph, with the following additions thereto: He denies that the said canal company has no interest in any surplus water existing in 1870, but (because it) has disposed of the same to Henry H. Dodge; on the contrary, he says that the said company is interested in having the water furnished under the grants prior to that of this defendant accurately gauged, as before shown, and in having such surplus to furnish to the said Dodge under his said lease, and in obtaining under it the stipulated rent therefor, which otherwise
163 would not be reserved by the said company. He also denies that there is any provision in his existing lease requiring him "to repair or reconstruct the feeder of said live (level?) at dam No. 1," &c., as by reference to said lease will fully appear. He also distinctly and unequivocally denies the further allegations of plaintiff, that in point of fact the said resolution was passed, not to remove obstructions to the navigation of the canal, but that the same was passed at the pressing instance of the defendant Dodge, and to increase the value of his grant from said company as hereinbefore set out. On the contrary, this defendant says, and he will be able to show by abundant evidence here-

after, if it becomes necessary, that so far from pressing or instigating the passage of the said resolution, he remonstrated against it, and endeavored with those to whom he spoke on the subject at all, to prevent its passage by the board of directors of the said canal company, but
164 without effect, in their view of the interest of the company & of the paramount interests of navigation on the said canal. But since the right of this defendant to have done so, if he had so chosen, is now called in question by the said plaintiff, he now says that, as the lessee of the residue of all the surplus water to the extent of fifteen hundred (1,500) inches of water, above all valid prior grants thereof, if he had done as is charged by plaintiff, this defendant had then, and has now, under the terms of his lease from said company, and especially the said covenant of the said company with him, a perfect legal right to do so, and to insist then, as he does now, that all surplus water claimed under valid prior grants shall be accurately & properly gauged by the canal company, in discharge of its obligations to him, at the place and in the manner called for by the said grants, and not otherwise; that is to say, in the same manner as he concedes that his surplus, under the terms
165 "canal measurement," shall measured to him by said canal company, at the canal bank.

He says further, that having hitherto been negligent and indulgent toward prior grantees in the assertion of his legal rights, he now claims that his lease has been duly recorded according to law, and that, as required by the amendment to the original charter of the canal company before referred to in paragraph No. 3 (which confers the authority to make grants of surplus water, &c.), his said lease has been regularly made "by the said presidents and directors, acting in behalf of said company, and with the consent and approval thereof, expressed at a general meeting thereof, in which a majority in interest of said stock was represented"; that his said lease is the only one which has been so approved, and which has been recorded as required by law, as he has been informed and verily believes, and will be able to show hereafter; and that
166 it is therefore the only valid water lease which has been made by the canal company in the exercise of the said power; and that, as against the plaintiff and all others claiming under invalid prior this defendant is entitled to take precedure of them, to the extent of his granting 1,500 inches, over all other prior leases not so approved and recorded according to law; and, among others, to the lease under which the plaintiff claims the 125 inches of surplus water, not derived from this the said defendant.

12. This defendant also, on information and belief and upon the advice of counsel, adopts as his answer to this paragraph the answer of his co-defendant, the canal company, filed herewith; and he insists that said answer asserts the true legal and equitable construction of the plaintiff's lease and assignment of surplus water, and of the corresponding rights of the said company and of this defendant, and to the
167 same—that the rights of the said plaintiff are not as claimed by him in said paragraph of his bill of complaint; and further, that he has no equitable cause of action against the defendants herein by the injunction prayer or otherwise.

And having answered the said plaintiff's bill as fully as he is advised it is material to do, this defendant prays to be hence dismissed, with his reasonable costs, &c., &c.

HENRY H. DODGE.

JOHN A. WILLS,
Solicitor for Def't Dodge.

Personally appears H. H. Dodge, who made oath, according to law, that the statements in the answer, of which the above is a copy, are true to the best of his knowledge, information, & belief.

H. H. DODGE.

Sworn to and subscribed before me this 9th day of June, A. D. 1873.
[L. S.] SAM'L C. MILLS, *J. P.*

DISTRICT OF COLUMBIA,
Washington County, ss:

Henry H. Dodge, whose name is signed to the foregoing answer, makes oath, according to law, that he knows the contents thereof, and that the facts therein stated as of his own knowledge are true, and that he believes those to be true which are therein stated on the information of others.

HENRY H. DODGE.

Sworn & subscribed before me this 3d day of April, 1873.
[SEAL.] R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

168 We, the undersigned, proprietors & leaseholders of water-power of the Chesapeake & Ohio Canal Company, at Georgetown, D. C., hereby request said company to set off eight hundred & fifty (850) inches of water in account of the lease held by Mr. H. H. Dodge.

(Signed) A. H. HERR.
JOS. S. WELCH.
D. L. SHOEMAKER.
GEO. SHOEMAKER.
M. YOUNG.
JOHN DAVIDSON.

GEORGETOWN, D. C., *May 2nd*, 1870.

169 It is hereby agreed by and between Henry H. Dodge and George Shoemaker, both of Georgetown, in the District of Columbia, that the said Dodge extends to the said Shoemaker the privilege of using two hundred inches of water, of the fifteen hundred leased by said Dodge from the Chesapeake & Ohio Canal Company, by lease dated February 17th, 1870, and by drawing the same through the gauge or gauges in the forebay or trunk used for conducting the water from the Chesapeake & Ohio Canal to his mill-wheel or wheels, for the period of thirty days from the date hereof, or until he, the said Dodge, calls upon him, the said Shoemaker, for its surrender.

And the said Shoemaker bind' himself, his heirs and assigns, to pay to the said Dodge the sum of fifty dollars, on the signing of this agreement, for the privilege hereby extended to him by said Dodge,
170 of thirty days, or in full payment for whatever further period, not exceeding one year, during which the said Dodge may be willing to allow the said Shoemaker to draw the said amount of water through his gauge or gauges.

And the said Shoemaker further binds himself, his heirs & assigns, upon the receipt of a written notice from said Dodge, his heirs or assigns, delivered to him, or at his place of business, requiring him to surrender the said two hundred inches of water to him the said Dodge, that he will without any hesitancy whatsoever, immediately thereafter cause the said opening of his gauge or gauges to be reduced to the ex-

tent of two hundred square inches: and further pledges himself, his heirs & assigns, not to cause the said Dodge any trouble, let, or
171 hindrance in resuming possession & use of the two hundred inches of water belonging to him the said Dodge, and loaned to said Shoemaker for such period of time beyond the thirty days as may suit the pleasure or option of said Dodge.

And the said Shoemaker further pledges himself, his heirs & assigns, that in accepting the privilege hereby extended to him, that he will not prejudice the rights or jeopardize the interests of said Dodge in any manner whatsoever.

It is distinctly understood by and between the parties that the charge of fifty dollars for the privilege extended to said Shoemaker is not to be considered as a charge for thirty days, or with a view to a further charge of that amount, or more or less than that amount, for any
172 number of days thereafter; but is to be considered as the full payment to be made by Shoemaker to Dodge, for the time the said Dodge shall be willing to allow the use of said amount of water to said Shoemaker, should it be thirty days, sixty days, six months, or twelve months; but should said Dodge allow this privilege to last to the twelfth month from the date hereof, then a new arrangement must be made between the parties, and this arrangement is to be considered as fully ended without further notice from said Dodge.

In witness whereof the said parties have hereto subscribed their names on this seventh day of May, A. D. 1870.

(Signed) GEO. SHOEMAKER.
HENRY H. DODGE.

Witness:
JOHN W. METZ.
[Stamp, H. H. D., G. S., May 7th, 1870.]

A true copy—Test:
[SEAL.] R. J. MEIGS, *Clerk*,
By L. C. WILLIAMS,
Ass't Clerk.

173 In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE & OHIO CANAL COMPANY AND H. H. Dodge. } No. 3102.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, the subscriber, a justice of the peace of the District of Columbia, in and for the county of Washington, on this nineteenth day of March, A. D. 1873, personally appeared A. P. Gorman, who, on his solemn oath, deposes and says that he is the president of the Chesapeake & Ohio Canal Company, and has been so from 17th of June, 1872, and that his action as president with reference to the policy of the canal company, in requiring the millers at Georgetown to return their
174 gauges to the banks of the canal, as called for by the terms of their respective leases, was not instigated by H. H. Dodge, but was governed solely by a regard to the interest of the canal company. That he recommended to the board of directors to require the change in the location of the gauges, he was, and is now, convinced that to prop-

erly protect the interest of the company it is absolutely necessary for its officers to have it in their power to diminish the flow of water to the mills, or entirely shut it off when necessary for purposes of navigation.

And further he says, that about the time that he recommended to the board of directors the repeal of the resolution of February, 1865, and to require the lessees of water to restore their respective gauges to the canal bank, H. H. Dodge, on the contrary, did urge him not to
175 pass the resolutions, but to permit the gauges to remain as now located; but that he was convinced that such change of gauges was necessary in order that the company should have full control of them, and to prevent the possibility of the gauges being tampered with, and a larger quantity of water being drawn than the lessees are entitled to under their leases, and of thereby interfering with the quantity of water required by the demands of navigation; and therefore he insisted that the gauges should be placed at the canal bank as stipulated by the leases.

A. P. GORMAN.

Sworn and subscribed before me this 19th day of March, A. D. 1873.
SAM'L C. MILLS, *J. P.* [SEAL.]

176 In the supreme court of the District of Columbia. In eqnity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE & OHIO CANAL COMPANY AND Henry H. Dodge. } No. 3102.

STATE OF MARYLAND,
Baltimore City, to wit:

On this eighteenth day of March, 1873, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared George S. Brown, who made oath on the Holy Evangely of Almighty God, deposes and says, that he is a director of the Chesapeake and Ohio Canal Company, and has been so from June, 1870, and that his action as such director with reference to the policy of the canal company in requiring the millers at George-
177 town to return their gauges to the banks of the canal, as called for by the terms of their respective leases, has been governed solely by regard to the interest of the canal company, and that he has not been influenced in any degree by suggestions in reference thereto from the said H. H. Dodge; nor was the action of the board of president and directors in any way suggested or influenced by the said Dodge, to the best of his knowledge and belief. And further, that he has never been spoken to by the said Dodge on the subject of gauges.

GEORGE S. BROWN.

Subscribed and sworn to before me this eighteenth of March, 1873.
W. H. HAYWARD, *J. P.*

STATE OF MARYLAND,
Baltimore City, set:

I hereby certify that W. H. Hayward, esquire, before whom
178 the annexed affidavit was made, who has hereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore City, this 18th day of March, A. D. 1873.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND Henry H. Dodge. } No. 3102.

STATE OF MARYLAND,
Baltimore City, ss:

179 On this 18th day of March, 1873, before me, the subscriber, a justice of the peace of the State of Maryland in and for the city of Baltimore, personally appears Gilmon Meredith, who made oath on the Holy Evangely of Almighty God, and deposes and says, that he is a director of the Chesapeake and Ohio Canal Company, and has been so from June, 1870, and that his action as such director with reference to the policy of the canal company in requiring the millers at Georgetown to return their gauges to the banks of the canal, as called for by the terms of their respective leases, has been governed solely by regard to the interest of the canal company, and that he has not been influenced in any degree by suggestions in reference thereto from the said H. H. Dodge, nor was the action of the board of president and
180 directors in any way suggested or influenced by the said Dodge, to the best of his knowledge and belief; and further, that he has never been spoken to by the said Dodge on that subject.

GILMON MEREDITH.

Subscribed and sworn to before me this eighteenth of March, 1873.

W. H. HAYWARD, *J. P.*

STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that W. H. Hayward, esquire, before whom the annexed affidavit was made, who has hereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of
181 the superior court of Baltimore City, this 18th day of March, A. D. 1873.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND H. H. Dodge. } No. 3102.

STATE OF MARYLAND,
Anne Arundel County, sct:

Before me, the subscriber, a justice of the peace of the State of Maryland, in and for Anne Arundel County, on this 11th day of March, A.

D. 1873, personally appeared G. M. Watkins, who, on his solemn
182 oath, deposes and says that he is a director of the Chesapeake and Ohio Canal Company, and has been so from June 17, 1872, and that his action as such director, with reference to the policy of the canal company in requiring the millers at Georgetown to return their gauges to the banks of the canal as called for by the terms of their respective leases, has been governed solely by a regard to the interests of the canal company; and that he has not been influenced in any degree by suggestions in reference thereto from the said H. H. Dodge; and further, that he never has been spoken to by the said Dodge on that subject.

G. M. WATKINS.

Subscribed and sworn to before me this 11th day of March, A. D. 1873.

W. H. GASSAWAY, *J. P.*

183 STATE OF MARYLAND,
Anne Arundel County, set:

I hereby certify that Wm. H. Gassaway, esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for Anne Arundel County, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the circuit court for Anne Arundel County, this eleventh day of March, 1873.

[SEAL.] SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County.

184 In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND Henry H. Dodge. } No. 3102.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, the subscriber, a justice of the peace of the District of Columbia, in and for the county of Washington, on this twenty-eighth day of March, A. D. 1873, personally appeared James G. Berret, who on his solemn oath deposes and says, that he is a director of the Chesapeake and Ohio Canal Company, and has been so from June, 1870, and that his action as such director, with reference to the policy of the canal company in requiring the millers of Georgetown to return
185 their gauges to the banks of the canal, as called for by the terms of their respective leases, has been governed solely by a regard to the interests of the canal company, and that he has not been influenced in any degree by suggestions in reference thereto from the said Henry H. Dodge; nor was the action of the board of president and directors in any way influenced by the said Dodge, to the best of his knowledge and belief; on the contrary, he says that when the said Dodge heard that such policy was intended to be adopted by the board, he urged this deponent not to concur in the same.

JAMES G. BERRET.

Subscribed and sworn to before me this 28th day of March, A. D. 1873.

JAMES DONALDSON, [SEAL.]
Justice of the Peace.

186 In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND H. H. Dodge. } No. 3102.

STATE OF MARYLAND,
Anne Arundel County, set:

Before me, the subscriber, a justice of the peace of the State of Maryland, in and for Anne Arundel County, on this 11th day of March, A. D. 1873, personally appeared Michael Bannon, who, on his solemn oath, deposes and says, that he is a director of the Chesapeake and Ohio Canal Company, and has been so from the 17th day of June, 1872, and that his action as such director, with reference to the policy of the canal company in requiring the millers at Georgetown to return
187 their gauges to the banks of the canal, as called for by the terms of their respective leases, has been governed solely by a regard to the interests of the canal company; and that he has not been influenced in any degree by suggestions in reference thereto from the said H. H. Dodge; and further, that he has never been spoken to by the said Dodge on the subject.

M. BANNON.

Subscribed and sworn to before me this 11th day of March, A. D. 1873.

W. H. GASSAWAY, *J. P.*

STATE OF MARYLAND,
Anne Arundel County, set:

I hereby certify, that Wm. H. Gassaway, esquire, before whom the annexed affidavit was made, and who has hereto subscribed his name, was, at the time of so doing, a justice of the peace of the State
188 of Maryland, in and for Anne Arundel County, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the circuit court for Anne Arundel County this eleventh day of March, 1873.

[SEAL.] SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County.

In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND H. H. Dodge. } No. 3102.

STATE OF MARYLAND,
Anne Arundel County, set:

Before me, the subscriber, a justice of the peace of the State of
189 Maryland in and for Anne Arundel County, on this 11th day of March, A. D. 1873, personally appeared D. S. Biser, who, on his solemn oath, deposes and says that he is a director of the Chesapeake

and Ohio Canal Company, and has been so from July, 1872, and that his action as such director with reference to the policy of the canal company in requiring the millers at Georgetown to return their gauges to the banks of the canal, as called for by the terms of their respective leases, has been governed solely by a regard to the interests of the canal company, and that he has not been influenced in any degree by suggestions in reference thereto from the said H. H. Dodge; and further, that he has never been spoken to by the said Dodge on that subject.

D. S. BISER.

Subscribed and sworn to before me this 11th day of March, A. D. 1873.

W. H. GASSAWAY, *J. P.*

190 STATE OF MARYLAND,
Anne Arundel County, set:

I hereby certify that Wm. H. Gassaway, esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland, in and for Anne Arundel County, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the circuit court for Anne Arundel County this eleventh day of March, 1873.

[SEAL.] SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County.

True copies.—Test:

[SEAL.] R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

191 In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND H. H. Dodge. } No. 3102.

STATE OF MARYLAND,
Anne Arundel County, set:

Before me, the subscriber, *or* justice of the peace of the State of Maryland in and for Anne Arundel County, on this 11th day of March, A. D. 1873, personally appeared T. L. Patterson, who, on his solemn oath, deposes and says that he is a civil engineer, and was employed by the president of the Chesapeake and Ohio Canal Company in August, 1872, to make an examination and report upon the gauges at the mills in Georgetown, and that in the professional opinions and recom-
192 mendations expressed in his report of August 13, 1872, he was in no wise influenced by H. H. Dodge; and further, that the said Dodge had expressed regret to him at the subsequent action of the board in requiring the removal of the gauges to the canal bank.

T. L. PATTERSON.

Subscribed and sworn to before me this 11th day of March, A. D. 1873.

W. H. GASSAWAY, *J. P.*

STATE OF MARYLAND,
Anne Arundel County, set:

I hereby certify that Wm. H. Gassaway, esq., before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for Anne Arundel County, duly commissioned and sworn.

193 In testimony whereof I hereto set my hand and affix the seal of the circuit court for Anne Arundel County this eleventh day of March, 1873.

[SEAL.] SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County.

In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND Henry H. Dodge. } No. 3102.

STATE OF MARYLAND,
Baltimore City, ss:

On this 21st day of March, 1873, before me the subscriber, one of the justices of the peace of the State of Maryland, in and for the city
194 of Baltimore, personally appears Wm. R. Hutton, who made oath on the Holy Evangely of Almighty God, and deposes and says that he is a civil engineer, and has been such since the year 1850, and that he is 47 of age; and further deposes and says that during the two years and a half that he held the position of chief engineer of the Chesapeake and Ohio Canal Company, he was never requested or urged by Henry H. Dodge to require the gauges at the mills in Georgetown, District of Columbia, to be placed at the canal bank as called for by the respective water leases.

WM. R. HUTTON.

Subscribed and sworn to before me on this 21st day of March, 1873.
W. H. HAYWARD, *J. P.*

195 STATE OF MARYLAND,
Baltimore City, set:

I hereby certify that Wm. H. Hayward, esquire, before whom the annexed affidavit was made, who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore City, this 21st day of March, A. D. 1873.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

196 In the supreme court of the District of Columbia. In equity.

GEORGE SHOEMAKER
vs.
CHESAPEAKE AND OHIO CANAL COMPANY AND Henry H. Dodge. } No. 3102.

STATE OF MARYLAND,
Baltimore City, ss:

On this eighteenth day of March, 1873, before me, the subscriber, a

justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared Charles P. Manning, who made oath, on the Holy Evangely of Almighty God, and deposes and says that he is a civil engineer, and has been such since A. D. 1836; and that he is fifty-six years of age. And further deposes and says that his recom'endations to James C. Clarke, the late president of the
197 Chesapeake and Ohio Canal Company, as contained in his letter to said Clarke, dated May 9th, 1872, to the effect that the gauges of the mills at Georgetown should be placed at the canal bank as required by the respective leases to the mills, was simply a reateration of his former professional opinions expressed by him to the board of president and directors of the Chesapeake and Ohio Canal Company in the year 1865, and that he was not influenced in any manner whatsoever by Henry H. Dodge in making said report, but has always held the opinion, and does now, that the company should require the gauges to be at the bank of the canal, and under the control of the officers of said company, and had so given his professional opinion to the president and directors of said company prior to his acquaintance with said Henry H. Dodge.

CHARLES P. MANNING.

Subscribed and sworn to before me this eighteenth day of March, 1873.

W. H. HAYWARD, *J. P.*

198 STATE OF MARYLAND,
Baltimore City, set:

I hereby certify that Wm. H. Hayward, esquire, before whom the annexed affidavit was made, who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore City, this 18th day of March, A. D. 1873.

[SEAL.] GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

True copies.—Test:
[SEAL.]
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

199 *Admissions by def't.*

In supreme court District of Columbia.

A. ROSS RAY
vs.
CHES. AND OHIO CANAL CO. } No. 3090. Equity doc. 12.

In the above-entitled cause, the following admissions are made, viz:

1. That the assignment of water-power by Bomford to Ray was ratified by the defendants, as appears by writing annexed to the assignment as appears in Exhibit R. & Bro., No. 2.

2. The averments of paragraph No. 8, as to the contents of the leases, the application of the millers in 1865, to be allowed to draw water at their wheels, the passage of the resolution of February 23, 1865, a copy of which is in Exhibit R. & Bro. No. 5, the assent of the millers, including complainants to the terms thereof, are admitted. The averments of

paragraph No. 16 are also admitted for the purposes of the present hearing.

3. It is admitted that, while the defendant has knowledge of abuses by other millers of the privileges conceded to them by the resolution of February, 1865, as averred in the answer to paragraph No. 8, it has no information of any such abuse by the complainant, necessitating a change of their particular gauge to the canal bank, for the purpose of navigation, or in respect of the tow-path, or for the security of the canal or its works.

(Signed) WALTER S. COX,
Solicitor for Defendants.

Filed, June 10th, 1875.

200 *Replication.—Filed June 23d, 1873.*

In the supreme court of the District of Columbia.

A. ROSS RAY ET AL.
vs.
THE CHESAPEAKE & OHIO CANAL CO. } No. 3090. Equity docket 12.

The complainants join issue with the defendants.

W. D. DAVIDGE,
Sol'r for Compl'ts.

Hearing at sp'l term.

In the supreme court of the District of Columbia. Equity.

RAY ET AL.
vs.
CHES. & OHIO CANAL CO. } 3090.

Enter this cause for hearing on the calendar for May special term.

W. S. COX,
Att'y for Def't.

April 17, 1875.

Calendared as directed.
By the clerk.

201 *Decree in special term.—Filed July 20, 1875.*

In supreme court District of Columbia.

A. ROSS RAY
vs.
CHES. AND OHIO CANAL CO. } No. 3090. Equity doc. 12.

This cause coming on to be heard was argued by counsel and duly considered, and the court being of the opinion that under the leases admitted by the defendant the lessees were entitled to such quantity of water as would, under the conditions of the leases, pass through an apperture located at canal bank and of the prescribed contents, but that by gauging such quantity at the canal bank as required, loss ensued to the

lessees, and that in consequence the resolution of the 23d of February, 1865, was passed by the defendant; that the assent in writing required by said resolution was duly given, and that whereupon the same was carried into execution and has since been recognized and acted on as well by the lessees of water assenting thereto as by the defendant, whereby the same became and is irrevocable; that by the true intent and meaning of said resolution the complainants are entitled to draw at the point where their gauge is placed the full quantity of water leased if drawn at canal bank under the conditions of the leases, and that the power of the defendant to alter or change the position of the gauge is only as contemplated by the leases, or, in other words, where the defendant could alter or change if the gauge was at canal bank under the leases instead of at the present position under said resolution, that is where the alteration might be necessary to prevent or lessen inconvenience to the navigation of the canal or the use of its towing-path, or for the greater security of the canal or any of its works, and the
202 court being further of the opinion that no contingency in which the defendant could alter or change the position of said gauge had arisen, and that the claim of the defendant to alter or change such position arbitrarily or irrespective of such contingency has no existence in law, therefore the court doth hereby, this 20th day of July, 1875, order, adjudge, and decree that the defendant and his officers and agents be, and are hereby, perpetually enjoined and prohibited from altering or changing the position of said gauge, and from claiming or demanding of the complainants such alterations or change save only in the contingencies provided for by said resolution as hereby construed, and from stopping or cutting off the supply of water, and from in any manner interfering with such supply or with the complainants by reason of their refusal to comply with the demand of the defendant contained in the resolution and letter dated respectively December 12th, 1872, and January 9th, 1873, and made part of the bill, or any similar demand.

By the court.

A. WYLIE, *Justice.*

Appeal to gen. term filed.

In the supreme court of the District of Columbia.

RAY ET AL.
vs.
CHES. & OHIO CANAL CO. } 3090. Eq. dock. 12.

Enter an appeal on behalf of defendant to the general term from decree passed July 20, 1875.

WALTER S. COX,
Sol'r for Defendant.

Appeal entered and cause calendared.
By the clerk.

203 *Decree in gen. term.—March* 4, 1876.

In the supreme court of the Dist. of Columbia. In general term, March 4th, 1876.

A. ROSS RAY AND ALBERT RAY, COMPL'TS, *vs.* THE CHESAPEAKE AND OHIO CANAL COMPANY, DEF'T. } 3090. Equity docket 12.

This cause came on to be heard upon the record from the special term and was argued by counsel, and thereupon, upon consideration of the whole matter, it is ordered, adjudged, and decreed that the decree of the special term of July 20, 1875, from which the appeal to this court was prosecuted, be, and the same is hereby, affirmed with costs.

By order of the court.

Appeal to Supreme Court of the U. S.

In the supreme court of the District of Columbia. Equity.

A. R. RAY & BRO. *vs.* CHES. & OHIO CANAL CO. } 3090.

204 The defendant in this cause prays an appeal from the decree rendered by the court to the Supreme Court of the United States.

WALTER S. COX,
Sol'r for Def't.

Allowed, Oct. 17, 1876.

D. K. CARTTER,
Ch'f Justice.

In the supreme court of the District of Columbia, October 17, 1876.

A. ROSS RAY & ALBERT RAY, COMPL'TS, *v.* THE CHESAPEAKE & OHIO R. R. CO., DEF'T. } In equity. No. 3090.

To A. ROSS RAY AND ALBERT RAY:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia and allowed, wherein the Chesapeake & Ohio Canal Company is plaintiff and you are defendants, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Service acknowledged, Oct. 19, '76.

W. D. DAVIDGE.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 19th day of October, 1876.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

(Indorsement on cover:) No. 288. The Chesapeake & Ohio Canal Company, appellant, vs. A. Ross Ray and Albert Ray. Dist. of Columbia sup. court. Filed 23d October, 1876.